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# MINUTES

BY

# SIR BARNES PEACOCK.

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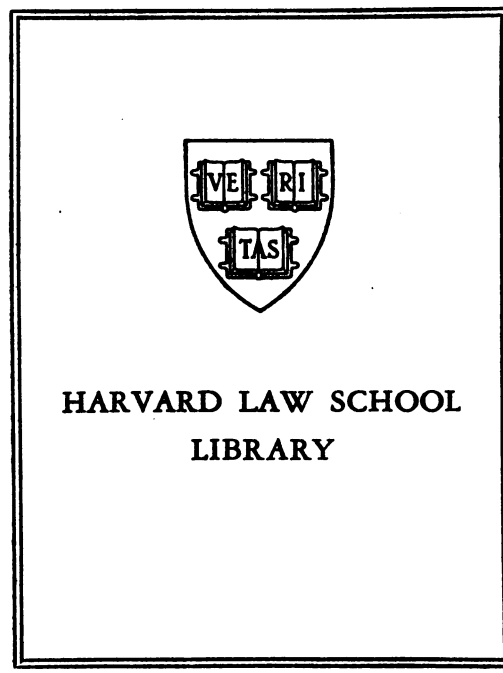


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THESE Minutes of the late Sir Barnes Peacock have been collected from the records of the different Departments of the Government of India and are reproduced in the same form as the Collection of Sir James FitzJames Stephen's Minutes.

H. W. C. C.

LEGISLATIVE DEPARTMENT;
*The 21st January, 1901.*

IN 403 PEA

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# MINUTES BY SIR BARNES PEACOCK.

## No. 1.

### CONFISCATION OF PROPERTY OF MAHARANEE JUNDA KOUR IN CONNECTION WITH SIKH WAR.*

*(22nd April, 1852.)*

HAVING given the fullest consideration in my power to the facts relative to this property, it appears to me that it is neither necessary nor expedient to legislate upon the subject.

2. I have read with great care the opinions of the Advocate General of Bengal, and of Mr. Loftus Wigram, and entertaining, as I do, the highest respect for the great learning and abilities of those gentlemen. I cannot but feel distrust in my own opinion when I find it at variance with theirs I should have been glad, if circumstances would have allowed of my conferring with the Advocate General upon the subject.

3 In my opinion the Government have the right not merely to detain, but to confiscate the property.

4. It seems to be admitted that the property was that of the Maharanee at the time when it first came into the possession of the Government.

5. If the Maharanee assisted the Sikh people in their hostilities against the British, she subjected herself to be dealt with as an enemy, and her property to be seized and confiscated.

6. It seems doubtful, however, whether legal proof to that effect can be adduced, although there is no moral doubt of the fact.

7. But even if such proof be wanting, I think the Proclamation of the 29th March, 1849, is conclusive that a war existed between the Sikh nation and the British.

I find it there stated, "Finally, *the Army of the State and the whole* of the Sikh people, joined by many of the Sirdars in the Punjab, who signed the treaties, and led by a Member of the Regency itself, have risen in arms against us, and have waged a fierce and bloody war, for the proclaimed purpose of destroying the British and their power."

* See, too, Minute No. 39 *post* p. 87.



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8. The Government of India were, in my opinion, the sole judges whether the *whole* of the Sikh nation were or were not responsible for the hostilities which had been carried on, and by the Proclamation above referred to, it was decided that the war had been waged by the Sikh nation, and that they must abide the consequences.

9. It appears to me that the effect of that Proclamation was conclusively to determine that every subject of that nation was an enemy, for whenever two nations are at war, all the subjects of the one are enemies of the other. *Vattel, 321.*

10. When hostilities have commenced, a State has a right to treat as enemies the subjects of the nation with which it is at war, and, subject to certain exceptions, to detain their persons as prisoners of war, and to seize and confiscate their property, *Grotius B. 3, c. 9, s 4(1)*, and the Municipal Courts have no jurisdiction on the subject. Elphinstone *v* Bedree Chand, 1 *Knapp, Pr. C. Cases 316.*

11. In my opinion, it was not necessary actually to confiscate the property, pending the war, it was sufficient that the property was during the war in the possession and under the control of the Government.

12. It is laid down by Kent "that in a land war moveable property, after it has been in complete possession of the enemy for 24 hours, *becomes absolutely* his, without any right of postliminy in favour of the original owner," *vs.* 1, *Kent's Commentaries, 109.*

13. This, I think, shows that no actual condemnation or confiscation is necessary in the case of such moveable property.

14. But even if confiscation were necessary, I find it stated in the Proclamation before adverted to—"The few chiefs *who have not engaged* in hostilities against the British *shall retain their property* and their rank," and again "The jagheers and all the property of Sirdars *and others*, who have, been in arms against the British, *shall be confiscated to the* State."

15. If, therefore, the Government of India think proper to confiscate the property, I am of opinion that they have the right to do so, and that no Municipal Court will have any jurisdiction in the matter.

16. It is not necessary to consider whether the Government of India could now seize and confiscate property of the Maharanee acquired since the Proclamation of 1849, for the property is actually in the possession of the Government, and was so prior to the termination of the war and prior to the Proclamation of March, 1849.

17. The question, therefore, as to the right to seize does not arise.

The case of Egsodah Bye *vs.* Hon'ble East India Company, is very different. There the property was acquired by Chimna Appa after he was a British subject.

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But here the question is simply as to the right to confiscate property already seized. I hold that the property is no longer that of the Maharanee, and that the Government have a right to confiscate it.

18. If I am right, neither the measure recommended by the Advocate General, nor that suggested by Mr. Wigram, is necessary, and unless absolutely necessary, I think it would be inexpedient to have recourse to either of them.

19. The latter would in substance be an *ex post facto* law as regards this property, and open to all the objections to which such a law is subject.

20. I should observe that in the Minute of the Most Noble the Governor General of the 26th March, 1851, His Lordship remarks—"If we have no control over this property by law, it is desirable that the Court of Directors should consider the subject, and instruct the Government how to act in obtaining a control over it, or in what mode to proceed."

See also the last paragraph of the Minute.

21. I do not find among the papers before me any specific instructions upon the subject from the Hon'ble Court of Directors, but merely in paragraph 4 of the letter, 6th August, 1851, the following—"We transmit you a copy of the opinion given by the East India Company's Counsel relating to the property formerly in the possession of Maharanee of Lahore."

22. It therefore appears to me that it was the wish of the Hon'ble Court of Directors that the Most Noble the Governor General in Council should further consider the matter, with the assistance of that opinion.

23. I have made the above observations with a view to assist the Most Noble the Governor General and my hon'ble colleagues in further considering the matter, and not as intending to express any final opinion upon the case without having had the advantage of discussing it with them, or of availing myself of their great experience and intimate knowledge of all the circumstances connected with this important question.*

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## No. 2.

### PROPOSAL TO LEGISLATE TO ENABLE THE SUDDER COURT TO FRAME RULES OF PRACTICE.

*(8th May, 1852.)*

THE Charter Act 3 & 4 Will. 4, c. 85, s. 43, enacts that the Governor General in Council shall have power to make laws, etc., save and except that the Governor General in Council shall not have power of making laws which shall in any way vary any of the provisions of that Act, etc.

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* See, too, Minute No. 39, *post*, p. 87.



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2. I am of opinion that a law delegating the power of legislating for any Courts of Justice in India would be at variance with the provisions of the abovementioned Act. The proposed Act does in effect give the Sudder Courts power to legislate, subject to the approval of the Governor General in Council, for all Courts subordinate to them with respect to the amendment of pleadings.

3. Should the Sudder Court frame rules at variance with any of the existing Regulations or Laws—which probably would be very desirable,—such rules, by the operation of section 2 of the proposed Act, would have the effect of repealing such Regulations, which certainly would be an act of legislation.

4. I have no doubt that the Sudder Courts might be safely entrusted with the power proposed to be given, but I think the Governor General in Council would be acting at variance with the 3 & 4 Will. 4 in giving them the power.

5. Upon this ground alone it appears to me that the Act should not be passed.

6. I think it very desirable that some rules for the amendment of pleadings should be framed, and I, therefore, propose that the Sudder Courts should be requested to frame such rules as they may think desirable and transmit them to the Governor General in Council so that, if approved, an Act may be passed to carry them into effect.

---

## No 3.

### CONSTRUCTION OF 3 & 4 WILL. 4, C. 85, SS. 1, 43, ETC.

*(16th July, 1852.)*

I AM of opinion that the Governor General in Council has power to make laws and regulations for all the non-Regulation Provinces, including those territories which have been acquired since the passing of the 3 & 4, Will. IV, c. 85.

2. By the first section of that Act all the territorial acquisitions and revenues mentioned in the 53rd Geo. III, c. 155, and all other territories *then* in the possession and under the Government of the East India Company (except the Island of St. Helena), were continued under such Government until the 30th of April, 1854, and the mode in which such Government is to be administered is pointed out by a series of sections commencing with section 39.

3. By that section it is enacted "that the *superintendence, direction and control* of the whole Civil and Military Government of all the *said* territories and revenues of India shall be vested in the Governor General of India in Council."

4. Section 43 authorizes the Governor General in Council to make laws and regulations for repealing, amending or altering

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any laws or regulations in force *in the said* territories, and to make laws, etc., *for all persons*, etc., *and for all places and things whatsoever within and throughout the whole and every part of the* SAID *territories* with certain exceptions therein pointed out.

5. Section 48 enacts *that all laws* and *regulations* shall be made at some meeting of the Council at which the Governor General *and at least three of the Ordinary Members of the Council* shall be assembled, and that all the other functions of the Governor General in Council may be exercised by the said Governor General and ONE or more Ordinary Members of Council.

6. By section 40 it is provided that the Fourth Ordinary Member of Council shall not sit or vote in the said Council, except at meetings thereof for making laws and regulations.

7. It has been suggested, as I understand, that the words "the territories NOW in the possession and under the Government of the East India Company" in the first section, and the words "the *said* territories" in the forty-third and other sections extend only to the territories which were in the possession and under the Government of the East India Company at the time when the Act was passed, and that consequently the Governor General in Council cannot legislate for any subsequently acquired territories, such for instance as the Punjab, Scinde, etc.

8. But it appears to me that by conferring the possession and powers of Government over the territories then in the possession and under the Government of the East India Company, the Legislature necessarily conferred all powers incident to such possession and government.

9. Where the provision of a Statute is general, everything which is necessary to make the provision effectual is supplied by the Common Law. Thus, if an offence be made felony by Statute, such Statute by necessary consequence subjects the offender to the like attainder and forfeiture, and requires the same construction as to those who shall be accounted accessaries before or after the fact as a felony at the Common Law does. Misprision of felony is as well incidental to a felony created by a Statute as to one at the Common Law (Section 2, Dwarris on Statutes, 663).

10. So I apprehend when the Legislature confers the possession and government of a territory, it confers at the same time everything which is incident to such possession and government.

11. Now the Government of India are authorized to raise and maintain Military and Naval Forces, they are required to bear the expenses of the Military or Naval Forces of the Crown sent to the East Indies at their request, they are empowered to make war in defence of their possessions, and to enter into treaties of peace.

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12. Such powers are distinctly recognized in sections 42 and 43 of the 33 Geo. III, c. 52, which by section 2 of the 3 & 4 Will. IV, c. 85, are continued in force.

13. The right of conquest is incidental to the power of making war, and the right of the conqueror to govern the conquered country is incidental to conquest. I therefore think that to such a Government as that conferred on the East India Company by the 3 & 4 Will. IV, c. 85, it is incidental to govern any territories which may be lawfully conquered by or ceded to them, but that such government must be exercised in the same manner as the government of the territories expressly placed under their control *Res accessaria sequitur rem principalem.*

14. In *Campbell* v. *Hale*, 1 Cowper's Reports 208, Lord Mansfield says: "It is left by the constitution to the King's authority to grant or refuse a capitulation. If he receives the inhabitants under his protection and grants them their property, he has power to fix such terms and conditions as he thinks proper. He is entrusted with making the treaty of peace, he may yield up the conquest or retain it upon what terms he pleases. These powers no man ever disputed, neither has it hitherto been controverted that the King might change part or the whole of the law or political form of Government of a conquered dominion." See p. 29.

15. But notwithstanding this right of the Crown, it is also clear that a country conquered by the British Arms is subject to Parliament.

16. In the case before alluded to Lord Mansfield says: "A country conquered by the British Arms becomes a dominion of the King in right of his Crown, and therefore necessarily subject to the Parliament of Great Britain."

17. There can be no doubt that a country conquered by the East India Company becomes a domini n of the Queen in right of her Crown, but I apprehend that the country so conquered is incidentally subject to the Government of the East India Company so long as they are in the possession and government of the territories, in the exercise of their government of which the conquest was made.

18. It has been suggested that the Governor General in Council in his executive capacity can, in the non-Regulation Provinces acquired since the 3 & 4 Will. IV, c. 85, make rules having the effect of laws.

19. In a Minute by Mr. Cameron, of the 16th January, 1846, he says—"I believe it is indisputable that the Crown is competent to legislate for any territory ceded by a foreign power in accordance with the terms of the treaty of cession;" and he cites *Campbell v. Hale* as an authority for that position. He says further—"This branch of the prerogative of the Crown *has been delegated* as regards such cases as that of Serampore *by the Crown* to the Governments of India through the East India Company."

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20. I quite agree that the power of making laws for countries lawfully ceded to the East India Company is vested in the Governor General in Council. But I think that authority arises, as in the case of conquest, incidentally out of the powers vested in the Government of India by the 3 & 4 Will. IV, c. 85.

21. The East India Company cannot exercise the prerogatives of the Crown in the territories under their Government, in the same manner as the prerogative is exercised by the Queen in other parts of her dominions; but the Government of such territories must be exercised in the manner pointed out by the Statute.

22. By section 48 it is expressly enacted that for the purpose of making laws and regulations, the Governor General and three of the Ordinary Members of the Council shall be assembled, and that all other functions may be exercised by the Governor General in Council and one or more Ordinary Member or Members of the Council.

23. The question under the consideration of Mr. Cameron was, whether the Governor General in Council in his executive capacity (by which I understand him to mean the Governor General in a Council composed of less than three Ordinary Members) could by treaty stipulate that Serampore should be subject to the rules and regulations of the Bengal Presidency.

24. I am disposed to agree with him that the Governor General in Council had that power. The making of a treaty not being the making of laws and regulations—a treaty upon the cession of a territory, by which it is stipulated that the territory shall be subject to certain laws, is in the nature of an agreement between two Governments, and the making of such a treaty, or a treaty of peace containing such a stipulation, is a very different act to that of making laws for a country after it has been ceded or conquered.

25. It is unnecessary for the present question to determine that point; but my present impression is that the making of a treaty falls under the definition "*other functions*" in the forty-eighth section, whether such treaty contains or not a stipulation respecting the laws by which such country should be governed; but that the Governor General in Council cannot make laws or regulations for any territory over which he has once, either by cession or conquest, acquired jurisdiction, except at a meeting at which at least three Ordinary Members of the Council are assembled.

26. I think it is unnecessary to enquire whether the making of such laws is an Act of executive or legislative jurisdiction, for whether it is the one or the other the language of the Statute is imperative; that the Council in such case must be composed of at least three Ordinary Members.

27. The Statute does not anywhere use the terms "Executive" or "Legislative" as applicable to Acts to be done by the

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Governor General in Council: the only distinction it draws is between the making of laws and regulations, and the exercise of other functions. In the one case the quorum of the Council must consist of at least three, and in the other of one or more Ordinary Members and the fourth Ordinary Member is excluded from sitting or voting at any meetings except those for making laws.

28. It should be remarked that the Governor General in Council does not derive his executive powers from the Queen and his legislative power from Parliament, but that all his powers are derived from one source, *viz.*, an Act of the Legislature which points out how particular Acts are to be done.

29. I make this remark because I think some difficulty and confusion has arisen by inquiring whether an Act proposed to be done is executive or legislative. The true question in construing the Act of Parliament is to ask—Is it proposed to make laws or regulations, or to exercise other functions?

30. Such question may always be easily answered. Not so the question "Is the Act proposed, executive or legislative," especially in a case like the present, when the Act might be done by the Crown of its own authority as an executive Act, or by the Legislature as an Act of legislation.

31. If the Act of making laws for a conquered country is executive and to be exercised by the Governor General in Council as the Representative of the Crown independently of the directions of the Statute, because the territory is not expressly mentioned in it, the Governor in Council of one of the Presidencies might in some cases have the power of making laws under the provisions of section 56 or the Governor of the Presidency alone might do so if the appointment of a Council for such Presidency should be revoked under section 57. But I think it would be quite contrary to the intention of the Legislature that the Governor in Council of either of the Presidencies should have the power of making laws for any such territories, when such power has been expressly excepted with respect to the Presidencies themselves by section 59.

I cannot understand how the Governor General in Council becomes the Representative of the Crown, or has any power over the territories in question except under the provisions of the Statute, or incidental thereto.

32. In my opinion, the act of making laws or regulations, whether executive or not, cannot be done by the Governor in Council of a Presidency by virtue of section 59, nor by the Governor General in Council except at a meeting of three Ordinary Members by virtue of section 48.

33. Upon the whole, therefore, I am of opinion that a territory lawfully conquered by or ceded to the East India Company since the passing of the 3 & 4 Will. IV, c. 85, is part of the dominions of the Queen, subject to be governed by the East

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India Company in the same manner and under the same control as the territories expressly mentioned in that Act.

That the Governor General in Council has the power of making laws and regulations for such territory at a meeting at which three Ordinary Members of the Council at the least are assembled—but not otherwise. That all laws and regulations made by the Governor General in Council, relating to such territory, must be transmitted to England, and laid before both Houses of Parliament in the same way as all other laws made by the Governor General in Council (see section 51). That all other functions relating to such territory may be exercised by the Governor General in Council, and one or more Ordinary Member or Members of Council.

That such territory may be annexed to any of the Presidencies by the Court of Directors under 3 & 4 Will. IV, c. 85, section 38.

(What would be the effect of such annexation as to the extension of the laws of the Presidency or the jurisdiction of the Supreme Court, is a very difficult question, depending upon the construction of the 39 & 40 Geo. III, c. 79, sections 1 and 20, the Charters of Justice, the 53 Geo. III, c. 155, section 1, and the 3 & 4 Will. IV, c. 85, section 2, and I am not prepared without further consideration to express an opinion upon that point.)

That before annexation the Executive Government must be administered by the Governor General in Council, and after annexation by the Governor in Council of the Presidency, under section 56, subject to the superintendence and control of the Governor General in Council, 13 Geo. III, c. 63, section 9, 3 & 4 Will. IV, c. 85, section 52.

34. I cannot think that it could ever be held that such territory is wholly independent of the East India Company, liable to be governed only by the Queen under the right which she has to change the laws of conquered or ceded countries; or by Parliament;—nor can I agree with my late hon'ble predecessor, Mr. Bethune, that such territory before annexation to a Presidency could be governed by the East India Company under the Charter of the 5th September, 10 Will. III.

35. The words of such Charter are to be found in the "Law relating to India," p. 10.

It should be remarked that by that Charter the Sovereign right, power and dominion is expressly reserved. Independently of which such section, so far as the appointment of Governors, &c., is concerned, seems to be repugnant to the 3 & 4 Will. IV, c. 85, and therefore repealed by that Statute.

36. If the argument is good, that the 3 & 4 Will. IV, c. 85, extends only to the territories therein mentioned, and does not affect the territories subsequently ceded or conquered, and that such territories are to be governed under the Charter of Will.

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III, the result would be that such newly acquired territories would be governed by the East India Company without being subject to the control of the Board of Commissioners for the Affairs of India; for it should be observed that the 33 Geo. III c. 52, which is the earliest Act now in force relating to such Board, is limited to territories which were then in the possession of the said United Company, and the power of the Board is conferred by section 4, which speaks merely of the same territories.

37. I cannot think that such a construction could ever be put upon the Statute 3 & 4 Will. IV, c. 85, and the Charter of Will. III.

38. I am confirmed in my opinion as to the power vested in the Hon'ble East India Company over newly acquired territories, by the fact that the East India Company have always in practice since the 33 Geo. III, c. 52, exercised the power of governing territories from time to time acquired by cession and conquest under Acts similarly worded without any objection either by Parliament or the Board of Control. On the contrary, the Legislature has distinctly recognized such territories as being in the possession and under the Government of the East India Company. For example, the 33 Geo. III, c. 52, section 1, enacts that the said territorial acquisitions in the said *former* Acts *mentioned, together with the territorial acquisitions lately obtained* in the East Indies, *shall remain and continue in possession* of the said United Company.

The acquisitions referred to were those which previously to that Act *had been* acquired, and were THEN in the possession of the East India Company.

The 53 Geo. III, c. 155, in language similar to that of the 3 & 4 Will. IV, c. 85, enacts that the territorial acquisitions *mentioned in the* 33 *Geo.* III, *c.* 52, *together with such of the territorial acquisitions* SINCE *obtained* upon the Continent of Asia, &c., as are now in the possession and under the Government of the said United Company, shall continue in the possession and under the Government of the said Company. Thus the Legislature distinctly recognized the power of the East India Company to acquire the possession and government of other territories beyond those expressly mentioned in the 33 Geo. III, c. 52, in the interval between the passing of the two Acts; and if they could acquire the possession and government of such territories under the 33 Geo. III (which was worded in this respect substantially the same as the 3 & 4 Will. IV, c. 85), I see no reason why they could not do so under the latter Act. Again the 53 Geo. III, c. 155, like the 3 & 4 Will. IV, c. 85, speaks of the territories NOW in the possession and under the Government of the East India Company.

Yet no one, I believe, would contend that those territories which were acquired between the 53 Geo. III and the 3 & 4 Will. IV,

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c. 85, were not included in the latter Act under the words "the territories now in the possession *and under the Government* of the East India Company."

39. Another point has been made, *viz.*, whether the Governor General in Council can govern any territories not annexed to one or other of the Presidencies.

My late hon'ble predecessor, Mr. Bethune, seems to have been of opinion that he cannot; but notwithstanding the great deference and respect which is due to any opinion expressed by him, I confess I cannot come to that conclusion.

40. There is nothing in the Act which expressly says that the whole of the territories are included in those Presidencies, or that every newly acquired territory must be annexed to one of them for the purposes of government. Section 38 directs that the Court of Directors shall declare and appoint what part or parts of any of the territories under the Government of the Company shall from time to time be subject to the Government of each of the several Presidencies now subsisting or to be established as aforesaid, and from time to time as occasion may require to revoke such appointment, &c., but the direction to appoint what parts shall be subject to each does not appear to me to compel the appointment of the whole to be subject to one or the other of the Presidencies.

41. I think that the Executive Government of any territories belonging to either of the Presidencies at the time when the Act was passed, subject however to the provisions of sections 38 and 59, must be administered by the Governor in Council, or Governor as the case may be, of that Presidency.

That such territory cannot be disannexed, nor any new territory annexed thereto, except under the provisions of 3 & 4 Will. IV, c. 85, section 38

42. The fact of a territory being treated and governed as part of a Presidency would no doubt be evidence of a lawful annexation; but I think the proper mode of annexing any new territory to a Presidency would be under the provisions of section 38.

43. With regard to territories which, at the time of the passing of the 5 & 6 Will. IV, c. 52, were under the Presidency of Fort William, I think it is in the power of the Governor General in Council from time to time to declare and limit what portion of them shall be placed under the Lieutenant Governor of the North-Western Provinces, and to direct what extent of authority shall be exercised by him—5 & 6 Will. IV, c. 52, section 2; but it appears to me that the Governor General in Council could not take under the immediate *executive* government of Governor General in Council any territory which formed part of another Presidency, although he might take under his own Government as Governor of Bengal any part of the Presidency of Bengal which had been placed under the Lieutenant Governor of the North-Western Provinces.

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44. I have thought it right, considering the importance of the questions raised, to state the reasons for the opinion which I have formed, though by so doing, I fear, I have extended this Minute to an inconvenient length.

45. I am prepared, if necessary, to act upon the above opinion, but considering the various opinions which have been expressed, the doubts which have been raised, and the great importance of the questions at a time, specially, when it is contemplated to alter the whole Penal Code of India, it appears to me that the proper course will be to submit the whole matter to the Hon'ble Court of Directors, who after the opinions expressed might feel it right, before the passing of any laws for the government of such territories, to take the opinion of their own counsel upon the subject, or through the Board of Commissioners for the Affairs of India, to be advised by the Law Officers of the Crown.

46. Such a course is especially advisable at this time, when the subject of the renewal of the 3 & 4 Will. IV, c. 85, is shortly about to come before Parliament, where all the above-mentioned doubts and difficulties as to the construction of the present Act may be removed.

47. In the meantime, the laws of the territories ceded or conquered since the 3 & 4 Will. IV remain in force, except so far as they may have been altered by the treaties of cession or peace, or subject to the question above discussed, by any Act of the Legislative Council. See *Hale* vs. *Campbell*, p. 213.

48. As to such of the non-Regulation Provinces as were under the Government of the East India Company, at the time when 3 & 4 Will. 4, c. 85, was passed, the Governor General in Council can pass such laws as may be considered expedient for their government.*

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## No. 4.

### PUBLIC DUTIES INCIDENT TO LANDHOLDING.

(*September, 1852.*)

I CANNOT see any reason why an European British subject should be exempt from the ordinary jurisdiction for the enforcement of public and police duties incident to the holders of land.

2. There seem to be many such duties—for instance—the providing dawks Regulation 20, 1817, section 10, cl. 4 & 5; providing supplies for troops passing through their lands, Regulation 6, 1825, section 2; the early communication to the Magistrate of murders, arson and theft, within the limits of their estates, Regulation 8, 1814, section 2; the early communication of unnatural or suspicious deaths, Regulation 20, 1817, section 14, cl. 1; the immediate communication to the police of any intended

* The Statute was eventually amended by s. 3 of the Indian Councils Act, 1892 (55 & 56 Vict., c. 14).

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sacrifice, Regulation 17, 1829, section 3, cl. 1; the apprehension of criminals within the limits of those estates, Regulation 3, 1812, section 9, cl. 5, and section 12; and many others of the same nature.

3. I have prepared what appears to me to be a proper Act, to supply the deficiency.

4. In a Minute by Mr. Cameron, he states that he remembers that Mr. Prinsep told him that, in his opinion, some of the duties incident to landholders ought not to be continued. This appears to be a very good reason for discontinuing any such that may exist, but not for altogether exempting British European subjects who may think fit to hold lands, from the duties and burthens which attach to other landholders.

## No. 5.

### ALIENATION OF INAMS WITHOUT CONSENT OF GOVERNMENT.

*(17th September, 1852.)*

IT appears to me that this is not a case for legislation as suggested in the précis.

2. The Hon'ble Court of Directors in their Despatch No. 5 of 1850, para. 10, say—"We concur in the view of the question taken by the Bombay Government that, according to the practice of existing Hindu States, the previous consent of Government is requisite to the validity of all adoptions so far as they affect successions to assignments of the public revenue. But it must be considered *whether the British Government having to so great an extent abandoned or rather neglected to enforce this rule in regard to Inams and some other tenures can now to any and what extent expediently exercise the right.*"

3. In para. 11 of the same Despatch, they observe—"We desire that you will take the whole subject into your early consideration, and *report the result to us.*"

4. And again in para. 4, they say—"The great principle which should guide us in the decision of the question is to give to Inamdars or other assignees of the public revenue possessing hereditary titles the same power of transfer which they possessed under the Native Governments whom we have succeeded, and the extent of that power may be deduced from the practice of those Governments or from that of such as still exercise authority. *This principle, however, must be subject to modification whenever we have by our practice conferred rights inconsistent with it.* With a view then to the question being considered *with reference to the whole of our possessions in India,* we remit it for your deliberate opinion."

5. I concur with the Most Noble the Governor General in thinking that a return in the Bengal and Madras Presidencies to a full assertion of the rights of Government is impossible, and that uniformity of practice should be adopted in each Presidency according to the rule which time has established there.

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6. Regulation 19 of 1793 of the Bengal Code provides both for hereditary grants and grants for life, but in no case does it state that the assent of Government to alienations or adoptions is necessary, and it declares that the claims of persons to hold lands exempt from public revenue shall be tried in the Courts of Judicature. Similar Regulations were passed for Benares and for the ceded and conquered Provinces and Cuttack. The Madras Code provides for such grants by Regulation 31 of 1802; and the Bombay Code by Regulation 57, 1827, ch. 9 and 10—see particularly cl. 1 and 2, c. 9 of that Regulation and cl. 1, Regulation 6, 1833.

7. None of these Regulations state that the consent of Government is necessary in the case of assignments or of the adoption of heirs, and in the absence of any such stipulation, I think such consent would not be necessary except in those particular cases or classes of tenures, in which such consent has been required or where a stipulation to that effect is contained in the deed or writing creating the tenure.

8. In Bengal and the North-Western Provinces, such consent does not appear to have been required in any case, and the Governments of Madras and Bombay seem not to have required it, with the exception of the former, in the case of shotrium tenures, and of the latter, in the case of Jagheer and Sarunjam.

9. It should be observed that the right of determining claims to successions in shotrium is reserved to the Government by Regulation 5 of 1831, Madras Code, see the Despatch of the Hon'ble Court of Directors, No. 12 of 1843, and the right to resume Jagheers is expressly vested in the Government by Regulation 17, 1827, c 9, s. 38, Bombay Code. By Act 16, 1838, all suits in regard to tenures, and the nature and extent of the interest to be enjoyed in virtue thereof, are to be brought in the Court of Adawlut and the Courts subordinate thereto.

10. With regard therefore to all hereditary Lakhiraj tenures, *falling within the Regulations* referred to above in paras. 6,7 and 8, with the exception of those in which such restriction has been adopted in practice or where it is expressly provided for by the instrument creating the tenure, I think the Courts of Judicature (who would have to determine the point if raised) would hold that the consent of Government was not necessary to the validity of an assignment of the tenures or the creation of heirs by adoption.

11. I think it would be interfering with the rights of private property to pass an Act imposing any such restriction or requiring the payment of a fine to Government upon such assignment or adoption.

12. Claims on account of Inams, etc., in the Bombay Presidency where the lands are situated in the Deccan Khandeish and Southern Mahratta Country and in other Districts more

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recently annexed to the Bombay Presidency have been expressly provided for by the late Act II of 1852, and declared not to fall within the rules of c. 9 and 10, Regulation 17 of 1827, and cl. 1, Regulation 6 of 1833. If there are any claims to Inams or other similar tenures in any part of the territories under the Government of the East India Company not falling within the above-mentioned Regulations, it may be advisable to provide for them by a similar enactment, but as to tenures falling within the general Regulations in the Presidencies of Bengal, Madras and Bombay, in which no such restriction has hitherto been imposed in practice or expressly reserved by the instrument creating them, I think it would not be expedient on the part of the Government to insist upon the necessity of the owners obtaining their consent to assignments or adoptions. If any doubts exist as to the rights which belong to the holders of such tenures, let them be determined by the Civil Courts to whom that jurisdiction has been confided. But I think it would not be just by any Legislative enactment to deprive them of the rights, whatever they may be, which now belong to them by law, and it would be expressly contrary to the principle so justly laid down by the Hon'ble Court in the above quoted paras. 4 and 10 of their Despatch No. 5 of 1850.

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## No. 6.

### JURISDICTION IN RESUMPTION CASES.

( *February, 1853.*)

I HAVE given this case my best attention.

2. It appears to me that the Judicial Committee of the Privy Council were right in the principle which they laid down, *viz.*, that Regulation 2 of 1805 was applicable to cases tried before Collectors under Regulation 2 of 1819, and that the right of Government to institute proceedings for the assessment of lands to the public revenue was limited to the period of 60 years from the origin of the cause of action.

3. By Regulation 19 of 1793 all claims to hold lands free from revenue were to be tried in the Courts of Judicature.

4. By section 12 of that Regulation it was enacted that it should be the duty of the Collector, after receiving the sanction of the Board of Revenue, to prosecute in the Court of Dewanny Adawlut on behalf of the Government for the recovery of the public dues from the lands subject to the payment of revenue, and *that no lapse of time should be* considered as a bar to the recovery of the public dues from such lands.

5. By cl. 2, section 2, Regulation 2 of 1805, it was enacted that all claims on the part of Government, *whether for the*

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*assessment of land held exempt from the public revenue without legal and sufficient title to such exemption,* or for the recovery of arrears of the public assessment should be tried in the several Courts of Civil Justice to which the cognizance thereof might properly belong under the general regulations which had been *or might thereafter be enacted if the same should be regularly and duly preferred at any time within the period of sixty years from the origin of the cause of action.* At that time therefore the claims of Government to assess land held exempt from public revenue without sufficient title were limited to the period of 60 years.

6. By section 2, cl. 2, Regulation 2 of 1819, section 12 of Regulation 19 of 1793 was repealed, and by the same Regulation 2 of 1819 resumption claims were directed to be investigated by the Collector, see section 5, who was to summon witnesses and take their depositions in *judicial* form, and record his opinion on the case, sections 17 & 20, such decision was appealable to the Civil Courts, section 25, and by Regulation 3 of 1828 the appeal was transferred to special Commissioners. It was contended on the part of the East India Company in the argument before the Privy Council that Regulation 2 of 1805 was only applicable to suits in the ordinary Courts of Justice and not to proceedings before the Collector under Regulations 2 of 1819 and 3 of 1828—that Regulation 2 of 1805 was in force only so long as Government resorted to the Civil Courts in such cases under 19 of 1793.

7. It seems to me, however, that it was clearly not the intention of the legislature, when the jurisdiction of the Civil Courts in such cases was transferred to the Collectors by Regulation 2 of 1819, to alter the rights of the Government or of the landholders, or the period within which the claims of Government were to be preferred. That Regulation merely constituted a new tribunal for trying the rights. In fact it is expressly stated in the preamble to Regulation 3, 1828, that the appeal from the Collector to the ordinary Courts of Justice was given with the intention that the decisions of the Collectors and the Boards under Regulation 2 of 1819 should be held and considered to be judicial awards, and that the suits transferred to the ordinary Courts being in the nature of appeals should be speedily disposed of.

8. Nothing therefore can be clearer to my mind than that the tribunal of the Collector must be considered as a Court of Civil Justice to which the cognizance of resumption cases belonged within the meaning of Regulation 2 of 1805. I fully concur with Mr. Ricketts and Mr. Trevor that the argument against the decision of the Privy Council to be drawn from Regulation 14 of 1825 cannot be considered of much weight.

9. The majority of the Board of Revenue observe, paragraph 10, that they are not prepared to say that abstractedly and judicially considered the law of limitations is inapplicable to resumption cases.

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10. But although I think the principle above mentioned as laid down by the Privy Council was correct, I cannot concur in the application of that principle to the facts proved in the case, for I see no sufficient evidence to prove that the lands had been held free from assessment for the period of 60 years prior to the commencement of the proceedings in 1836. Possibly the fact may be so, but there was no evidence of it.

11. Mr. Baron Parke in delivering judgment observed that the only material evidence to raise the inference of exemption from revenue was the release of the title deeds, and the giving up of the estate in the year 1795 by the Collector. Such would not have been the case, if it had been proved that the lands had been held free from assessment as far back as 60 years prior to 1836.

12. It also appears to me, speaking with the greatest deference, that the decision was wrong in holding that the appellant could set up the limitation prescribed by Regulation 2 of 1805 as an answer to the claim of Government, in the Privy Council, when that point was never raised before the Collector or the Commissioner.

13. The Right Hon'ble Mr. Pemberton Leigh in delivering judgment on this point says, "there were no pleadings, and therefore it would be rather hard to bind the parties by an objection of so technical a nature, especially if on an investigation it is found to be a valid ground of defence." But whether there were pleadings or not, it appears to me that the point ought to have been raised before the Collector.

14. If such a defence had been set up, evidence might possibly have been adduced on the part of the Government to show that the Regulation above quoted was not applicable to the case, for instance they might possibly have proved that the tenure was merely a life tenure, and that the tenant for life had died within 60 years.

15. Indeed, according to the applicant's own case, I think the decision was wrong. He claimed, not because 60 years had elapsed since the origin of the Government's claim, but under a deed executed prior to 1765. He attempted to prove that there was such a deed, and that the tenure thereby granted was hereditary. It is true he failed in proving either of those facts, but in order to make the limitation a bar, it is necessary for him to contend that there was no deed, for if there had been a grant prior to 1765 it must have been presumed, unless the contrary were proved, that the tenure thereby granted was not hereditary—sec. 14 of 1825 s. 3, cl 3 and 4—in which case it would seem that the person in possession in 1790 would have been legally entitled to hold the land free from assessment for his life—cl. 4, s. 2, Regulation 19, 1793, and the origin of the claim of the Government would therefore date only from his death. In which case it is clear that 60 years could not have elapsed in 1836.



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16. I do not know how the facts are, but I merely make these observations to show that the appellant ought not to have been allowed to avail himself of the limitation of 60 years, not having set up that defence before the Collector. Mr Baron Parke in delivering judgment in the case admits that there was no sufficient evidence that the tenure was of an hereditary nature.

17. In the case of *Mussumut Imam Bando* v. *Hurgovind Ghose*, decided in July 1848, sec. 84, Moore's P. Council cases 403, it was decided that a question of limitation not having been raised in an inferior Court could not be set up in a Court of appeal. Mr. Pemberton Leigh in delivering judgment in that case observes—"The objection was not raised, *the appellants therefore had no opportunity of meeting it.*" That observation appears to me to be equally applicable to the present case.

18. I feel satisfied that the Judicial Committee of the Privy Council will never advise Her Majesty to allow the case to be re-heard, for independently of the fact that I believe it would be contrary to all precedent the judgment was delivered as far back as June, 1851.

19. In fact, the Hon'ble Court of Directors in their Despatch, dated the 22nd September, 1852, seem to have decided not to "attempt to obtain a re-hearing." They say—"After the fullest consideration by our Law Officers of the whole subject, they are clearly of opinion that as the Privy 'Council is the last Court of appeal,' it would be useless to attempt to agitate the matter further." And they proceed in para. 10 to say—"You will give your attention to the view thus taken of the effect of the Regulation 2 of 1805, and will consider whether it may render it necessary to pass any new Regulation on the subject, and you will also make us acquainted with your sentiments on the subject of the Memorial transmitted with your letter under reply."

20. With respect to legislation, I think it must be assumed that, as the law now stands, the Government has no right to assess lands which have been held free from assessment for a period of 60 years from the time when the right of Government to assess them first accrued, and that point has been determined by the highest Court of Judicature in these cases. And I think it would be a violation of the rights of property by any *ex post facto* law to render such lands liable to assessment. The case under consideration does not decide what is the origin of the cause of action. But I apprehend it is the time when the right of Government to assess the lands first accrued.

21. In the case of a Lakhiraj tenure held for life or for a term of years the cause of action would accrue on the death of the tenant for life or at the expiration of the term. In the case of a grant prior to 1765 not proved to be hereditary the cause of action would not accrue until the death of the person in possession in 1793 especially if he were the original grantee.

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22. I agree with the majority of the Board of Revenue that the cause of action does not arise from the date specified in the Taidad.

23. It is possible that the decision may not affect any of the other resumption cases for I understand that in very few of them the defence arising out of Regulation 2 of 1805 was relied upon. If so in all probability the decisions would not be reversed upon a review of judgment even if the Commissioner should feel himself bound to act upon the two principles laid down by the Privy Council, *viz.*, that Regulation 2 of 1805 is applicable to cases tried before a Collector, and that that Regulation may be relied upon on appeal though not set up before the Collector or Commissioner, for it is not likely that the evidence will show what was the date of the origin of the Government's claim, and I doubt very much whether the Commissioner would feel justified in granting a review of judgment to allow any party to set up a new case altogether at variance with his former defence which would be the case if a party who had claimed to hold land free from revenue in pursuance of a grant were allowed now to say that he is entitled to exemption from revenue because the lands have been so held for the last 60 years without any right at all.

24. But, should any cases have been decided, upon the express ground that Regulation 2 of 1805 was not applicable to cases before Collectors, or decided erroneously by reason of the misapplication or non-application of the rules of limitation, I am of opinion that it would be highly unjust to deprive the parties of the right, if they now have it, of obtaining a review of judgment. I, therefore, think that section 2 of the Act proposed by the majority of the Board of Revenue is objectionable, and ought not to be enacted. It appears to me to be in effect saying, that Government having obtained a decision in their favour, the judgment shall not be reviewed.

25. I cannot concur in thinking that cl. 1 of the Act proposed by the majority of the Board of Revenue should be enacted. That clause, as I understand it, would prevent any suit from being instituted after May, 1853, to try the right to assess lands which may have been held under a grant prior to 1765, for life or for a term of years, which may have terminated within the last 60 years, or to assess lands which may have become assessable only on the death of the person who was the possessor in 1790.

26. The third section appears to me also to be objectionable. It repeals *ex post facto* all limitation to the claims of Government where a person has held adversely for 60 years without any grant, which would certainly be a legislative interference with the rights of property.

27. Upon the whole I fully concur with Mr. Ricketts in thinking that it is better not to legislate at all in the matter,



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and I think it probable that, even as the law now stands, the parties to the cases of resumption determined within the last 12 years will not be able to do much in the way of a review of judgment, except in those cases, which the Board of Revenue believe to be very few, in which the limitation was pleaded before the Collector or Commissioner, and which have been erroneously decided. In such cases it would be very hard not to say unjust to deprive the parties of any right, which they may now have, to a review of the judgment.

28. I should have been glad, if possible, to have had a list of the resumption cases decided within the last 12 years, which, it is supposed, might be affected in any way by the late decision stating the amount of revenue resumed, and the nature of the defence set up in each case, and the ground of the decision, also whether any register of a deed was produced in the course of the investigation; but I presume such a return could not be obtained without much labour and difficulty.

29. I quite agree with the majority of the Board of Revenue that no such concession should be made as is solicited by the British Indian Association. The Government cannot admit that in any of those cases the origin of their claim accrued 60 years before the commencement of the proceedings, and it is quite clear that they cannot do so without having such a return as that which I have suggested. As to the petition of the owners of rent-free tenures under 100 bighas, I think it reasonable that some limitation should be put upon the claims of the zemindars. It is clear that their claims are within the spirit, if not within the letter of the rules of limitation applicable to ordinary cases between private individuals.

30. I cannot understand upon what principle it can be said that the claim to assess in the case of zemindars is a perpetually recurring cause of action which cannot be barred by the lapse of time—see judgment of Sudder Court Cases for 1848, p. 467. It can no more be a perpetually recurring cause of action than the claim of Government to assess rent-free lands above 100 bigahs. The point however has been decided in several cases, and, therefore, I think that some limitation should be fixed. And I see no reason why, in the case of zemindars, it should not be limited to 12 years from the time when the right to assess the lands first accrued, in the same way as all other claims are limited.

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## No 7.

### LIMITATION IN RESUMPTION CASES.

( *March, 1853.*)

I HAVE read the Minute of my Hon'ble Colleague Mr. Lowis with much attention. With the greatest deference, however, to

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his opinion, I cannot concur in thinking that the general words of cl. 2, section 2, Regulation 2 of 1805, are capable of the limited construction which he puts upon them.

2. It appears to me that the object of that Regulation was to extend the period of limitation on those Government claims which were then limited to 12 years, and to fix the period of 60 years as the limit for those and all other Government claims, which were then unlimited, whether they were for the assessment of land or not.

3. This view appears to me to be borne out by the recital in the preamble, which shows that the Legislature, at the same time that they considered the reason for the limitation of 12 years inapplicable to Government claims, had in mind the fact that the unlimited time formerly allowed by the laws of England in the case of the Crown had been restricted to the period of 60 years by the Nullum Tempus Act—9 Geo. 3, c. 16.

4. The recital referring to the limitation of 12 years proceeds thus—"The declared grounds, however, on which this limitation was introduced, *viz.*, the litigiousness and perseverance of the natives of this country in their suits and complaints, often productive not only of great inconvenience and vexation to their adversaries, but also of endless expense and actual oppression, are not applicable to suits for the recovery of the public rights and dues which may be instituted on the part of Government for subjecting the public claims and interests to the cognizance and decision of the established Courts of Justice. For such suits and claims the unlimited time heretofore allowed by the laws of England has been latterly restricted to a period of 60 years." The Regulation then proceeds by clause 1, section 2, to enact that the limitation of 12 years should not be considered applicable to suits for the recovery of public revenue or for any public right which might be instituted by Government, and by clause 2 of the same section, that all claims on the part of Government, whether for the assessment of land or for any other public right whatever, the judicial cognizance whereof has not been otherwise limited, should be tried by the Courts of Judicature, provided they should be preferred within the period of 60 years from and after the origin of the cause of action. I do not think that much importance can be attached to the argument to be derived from the Regulations 8 and 12 of 1805, by which the Regulations for the collection of the revenue, etc., were extended to the Dooab and to Cuttack.

5. The same argument which is used with reference to the provisions of Regulation 2 of 1819, *viz.*, that it was an oversight of the Legislature, may be applied with equal force to the argument to be derived from Regulations 8 and 12 of 1805, in which general words of reference only were used by the Legislature.

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6. The above being my opinion as to the intention of the Legislature in passing Regulation 2 of 1805, I think it would not be either politic or just to pass such a law as that proposed by my hon'ble colleague, and it appears to me that it would be quite as objectionable as if the British Legislature were to enact that, notwithstanding the *Nullum Tempus Act*, no lapse of time should be held to bar or to have barred any claim on behalf of the Crown.

7. Such an Act as that proposed would prevent any lapse of time from operating as a bar in resumption cases, but I think it would not have the effect of altering any belief which may have been formed by the general body of Lakhirajdars as to the intention of the Legislature in passing Regulation 2 of 1805.

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## No. 8.

### SMALL-POX AND INOCULATION.

*(11th April, 1853.)*

IT appears to me that, previously to passing an Act prohibiting inoculation with the small-pox, the Government should be satisfied that the evils thereby occasioned outweigh the advantages to be derived from it.

2. In the present state of vaccination in this country, the question is not one depending upon the relative merits of inoculation and vaccination; for, if a law prohibiting inoculation could be enforced, vaccination would not be substituted. If a law prohibiting inoculation could be enforced, the question would resolve itself into this —Is it better to have no prophylactic than to allow inoculation? And I do not think that the affirmative of that proposition is proved. It appears that, as far as the persons inoculated are concerned, a benefit is derived if the proper precautions are taken and the subjects properly treated. But by inoculation the disease may be frequently introduced into places which it would not have visited epidemically.

3. The Medical Board quote from Dr. Coupland's Dictionary of Medicine (which, they say, is received as a work of considerable authority in professional matters both at home and abroad) the following amongst other passages—"That inoculation would spread the distemper is certainly true when a few only resort to it, but even such diffusion would prevent the recurrence of those pestilential epidemics which follow the accumulation of a great number of unprotected in one locality and would diffuse the disease in a milder form than when it occurs epidemically; for it has been fully proved that infection from the inoculated distemper generally does not communicate

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so severe or dangerous an attack as infection from a natural and epidemic case. Besides, if inoculation were generally adopted at a proper age, there could not possibly be the pabulum for an epidemic outbreak and scarcely the occurrence of a natural case." In a note however by the Medical Board upon this passage, they say—"Experience in India is opposed to this assertion. The infection from inoculated small-pox is not believed to be necessarily less virulent than when taken from a case of epidemic or natural small-pox."

4. Still it does not appear that the public interests would be best promoted by preventing small-pox inoculation, where vaccination could not or would not be substituted for it, as a prophylactic. The passage quoted by the Medical Board from the abovementioned work, pages 110 and 117, show that, even if vaccination could be substituted, it is at least doubtful whether it is preferable to the general adoption of small-pox inoculation as respects inter-tropical climates and the dark races. The opinion of the author is evidently in favour of the adoption of inoculation generally.

5. The Medical Board, observing upon the doubts expressed in the paragraphs quoted by them in their report, say—"The doubts expressed in the paragraphs quoted as to the permanency of the protection conferred by vaccination are by no means of recent date, nor are they entertained in Europe alone by the eminent author of the work quoted; and from certain communications received through the India House and the Bengal Office in the course of the past year, from the President of the Epidemilogical Society of London, as well as from notices in the home medical periodicals, etc., the whole question appears to be at this moment engaging the serious attention of the profession in England, and it may fairly be expected that the result will be, sooner or later, to fix with greater precision the degree of reliance to be placed in vaccination, and the duration of the term for which its protection may be safely calculated on."

6. In the present state of the country, I think that a law prohibiting small-pox inoculation generally would be premature and impolitic. If such a law were passed, it seems to be the general opinion that, owing to the prejudice of the people, it could not be enforced, and that the police of the country is not in so efficient a state as to be trusted with carrying out its provisions. And I think it is highly impolitic to have a penal law which can be constantly evaded or violated with impunity.

7. For the above reasons, I would not prohibit inoculation generally.

8. With regard to Calcutta, I would not legislate, at any rate at present, but would rather wait and see the effect of the measures to be adopted for the purpose of extending the benefits of vaccination.

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## No. 9.

## USURY LAWS.

( *July, 1853.*)

THE law is certainly in an anomalous state. By 13 Geo. 3 c. 63, subjects of Her Majesty are prohibited from taking more than 12 per cent. interest. By Regulation 34, 1803, no higher rate of interest than 12 per cent. is to be decreed by the Courts of Civil Judicature.

2. The 13 Geo. 3, c. 63, does not extend to Native inhabitants, and Regulation 34, 1803, is not binding upon Hindus or Muhammadans in the Supreme Court. Hindus, therefore, within the limits of the Supreme Court are bound only by their own laws, and are at liberty to take any rate of interest, but beyond those limits, they cannot take more than 12 per cent.

3. British subjects cannot lawfully take more than 12 per cent. anywhere.

4. The present petition is a very reasonable one: it prays for uniform legislation for British subjects and Native inhabitants. This may be done either by repealing the Usury Laws altogether, or by extending the 13 Geo. 3 to all persons. My opinion is certainly adverse to any extension of the Usury Laws, and I am strongly in favour of repealing them altogether. Mr. Wilson of Moradabad has sent up a proposal for the repeal of Regulation 34 of 1803, and states that it is the prolific source of perjury and fraud. In my opinion it is just as impossible to regulate the rate of usury as that of any other article, and it is well known that, wherever the Usury Laws exist, all kinds of frauds and contrivances are resorted to for the purpose of evading them. In England, the Usury Laws have been repealed except as to loans under 10 pounds, and loans upon the security of land.

5. The law at Madras seems to be the same as in Bengal—see Regulation 34, 1802.

6. In Bombay, the law was formerly the same as in Bengal—see Regulation 1 of 1814; but in 1827, when the Regulations of Bombay were reduced to a Code, that Regulation was repealed, and it was enacted by Regulation 5 of 1827, section 10, that, whenever in any transaction a certain rate of interest has been agreed upon or is demandable by usage of trade or the custom of the country, such rate shall be lawful and binding on all parties, and that, when interest is due, and no rate has been agreed upon or is demandable by custom or usage, 9 per cent. per annum shall be the judicial interest, or rate allowed in Courts of Civil jurisdiction. By section 2 compound interest is allowed. I have never heard of any injurious consequences attending this Regulation in Bombay, and I see no reason why a similar provision should not be extended to Ben-

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gal and Madras, allowing persons to contract for any rate of interest they may think fit.

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## No. 10.

### LEGISLATION TO MEET ERRONEOUS JUDICIAL DECISIONS.

( *July, 1853* )

THE judgment of the Supreme Court at Bombay certainly appears to be an extraordinary one; for it seems, in a suit between Muhammadans, to have upheld a custom to deprive females of the right of inheriting any portion of the property of their relatives.

2. Such a custom appears to be at variance with the express directions of the Koran. The parties who relied upon it admitted themselves to be Muhammadans, but contended that the custom was an ancestral one in existence before their conversion to Muhammadanism. The Government has no means of forming an opinion as to the correctness of the decision except the mere statement of the petitioners, who were not even parties to the suit.

3. If the decision is wrong, neither the petitioners nor the claimant in the suit are bound by it; as it is admitted, an appeal will lie to Her Majesty in Council. It is said, however, that the claimant was too poor to appeal; but this surely is no ground for legislation. The petitioners do not contend that the law as it now stands is wrong, but that the decision is erroneous. They ask for an enactment that in future all disputed questions of inheritance, marriage, divorce, wills, &c., affecting any of the orthodox sects of Muhammadans, shall be decided according to the written law as laid down in the Koran and other authorities subordinate to it. I think it would be very dangerous for the Legislature to direct by what standard the Muhammadan law is to be decided. That, like every other law, must be determined by the authorities constituted for the purpose.

4. If the case be referred to the Courts here, they have not the means of saying whether the decision was right or wrong. If they should say that such a custom could not according to the Muhammadan law be set up by a Muhammadan after his conversion, it will merely show that, according to the statement of the petitioners, the judgment of the Supreme Court was erroneous; but it will not, in my opinion, render legislation necessary or expedient. It would be a bad precedent for the Legislature to interfere whenever their attention is called to an erroneous decision of a Court of Justice which may be set right by a Court of appeal.

5. It appears to me, therefore, that the better course will be merely to acknowledge the receipt of the petition.

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## No II.

## Marriage and Divorce in India.

*(18th August 1853.)*

THIS question arises out of a letter from Mr. Parry, the Marriage Registrar at Jessore, enquiring whether, if a Native Christian, who divorces his wife, applies to be married again, the Registrar is to refuse the certificate.

2. Under the Law as it now stands, I think he would be clearly bound to do so, and that no divorce upon proof of adultery before the Christian minister and the congregation could be recognized as having any legal effect.

3. I fully concur with the opinion expressed by the Most Noble the Governor General that the law relating to marriage and divorce in India ought to be amended. It certainly is in a most unsatisfactory state. I think there is great difficulty in the way of legislating effectually in this country, though great improvements in the law may be effected. The British Parliament, so lately as the year 1851, legislated upon the subject of marriages in India, and inserted provisions to prevent the solemnization of marriages where any impediment exists according to the law of England, and required an oath or affirmation to be made previously to any such marriage that there is not any lawful impediment of kindred or affinity. They also gave express powers to the Governor General of India in Council to make laws not inconsistent with their Act. From this, I think it must be assumed that the Legislature intended that the English law, which prevents marriages from taking place within certain degrees of affinity, should regulate marriages between Christians in India, and, if so, any Act of the Government of India authorising Native Christians to marry within any of the prohibited degrees of affinity might be considered as falling within the exception in section 43 of the 3 & 4 Will IV, c. 85, by which the Governor General in Council is prohibited from making any laws in any way affecting any law thereafter to be passed.

4. The degrees of affinity in England depend upon the Statute law. The Statute 32 Hen. 8, c. 38, renders valid all marriages which are not contrary to God's law. The 25 Hen. 8, c. 22, specified certain degrees within which marriages were prohibited by God's law. The last mentioned Statute, though it was passed partly with the object of avoiding the marriage with Queen Katherine, has been held to be a legislative enactment that marriages within the degrees therein mentioned are prohibited by God's law.

5. The Legislature, by extending the impediments depending upon consanguinity or affinity to marriages of Christians in India, have drawn no distinction between Native Christians and

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others professing the Christian religion; and there does not seem to be any reason in principle for drawing such a distinction, for what is contrary to God's law with regard to the one must be equally so with regard to the other. Considering, therefore, that the British Parliament has lately refused to alter the law with regard to affinity so as to render a marriage of a man with his deceased wife's sister legal, I doubt the propriety of passing a law in India which would render such a marriage lawful between Native Christians.

6. With regard to divorce also, I think there would be great difficulty in passing a law in India sufficiently comprehensive to meet all the exigencies of the case. If the Civil Courts of India are to have the power of granting divorces for adultery in the case of Native Christians, why should they not have the same power in other cases? There are many European British subjects and others in India who contract marriages there, from whom the power of obtaining a divorce for adultery is as far removed as it is from Native Christians.

7. If legislation, therefore, is to take place in India, I think the Act should extend to all marriages solemnized in India, except those of Hindus or Muhammadans, which are already provided for. I would not confine the Act to Native Christians, nor extend it to English marriages. By allowing a divorce in India in case of a marriage solemnized in England a conflict of laws would necessarily be created. An English marriage divorced in India would remain valid in England, especially if the parties were not domiciled in India. In Lilley's case, two British subjects were married in England and divorced in Scotland. The husband married again, and the Judges held that the second marriage was valid, and that the husband was guilty of bigamy. Lord Brougham has thrown doubts upon the authority of that case, and seems to think that the divorce would have been valid if the parties had been domiciled in Scotland at the time of the divorce. I think it very very doubtful whether an English marriage can be anywhere divorced except by an Act of the Legislature—at any rate in the present state of the law of England upon the subject of divorces. I think it would not be advisable to give the Courts in India power to divorce persons married in England. Even if a change of domicile after the marriage would render such a divorce valid in England, which to say the least of it is very doubtful, nothing would render the working of such a law more uncertain than to allow the validity of a divorce to depend upon the question of domicile. There are few British subjects, who come to India, who change their domicile, and it would be very undesirable to pass a law which might enable a British subject to obtain a divorce in India from an English marriage, which would be binding in England but of no avail in England, which would enable him to contract a second marriage in India binding

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there but void in England, the issue whereof, though legitimate in India, would be illegitimate in England.

8. I am not at all sure that the law might not go farther than I have proposed, and allow divorces to be granted under certain restrictions for adultery committed in India in every case except that of a marriage solemnized in England. In a well known case a marriage was celebrated in England, and the husband committed adultery and abandoned his wife and went to Scotland, where he resided above 40 days living in adultery. The Court, in delivering a very powerful judgment in support of a decree for divorce *a vinculo matrimonii*, observed that the relation of husband and wife was acknowledged *jure gentium*, and the right to redress wrongs incident to that relation attached on all persons living within the territory, though the marriage was abroad. It was not necessary, it was said, that foreigners should have acquired a domicile *animo revertendi*, and, if the law of Scotland refused to apply its rules to these domestic relations recognized by all civilized nations, Scotland could not be deemed a civilized country, as thereby it would permit a numerous description of persons to transverse it and violate with impunity all the obligations of domestic life.

9. I believe a Bill was brought into Parliament during the present Session to amend the law of divorce, but I am not aware of what has been done upon it.

10. I think upon the whole that the better course will be to obtain the opinion of the Advocate General upon the question submitted by Mr. Parry, and to communicate such opinion to him; for, although I entertain no doubt upon the subject, I think that course will be more regular than for the Government to consider the question as to the alteration of the law of marriage and divorce in India. I think it would be advisable to bring the whole question before the Hon'ble the Court of Directors in order that, if the Bill for altering the law of divorce has not yet been passed, provisions may be made with reference to the laws of India.

11. Should, however, it be determined to legislate at once in India upon the subject of divorce, I think the question which was brought to the notice of the Governor General in Council in 1841 by the missionaries, will also require attention. In a paper accompanying that petition and printed in the Report of the Indian Law Commissioners, 1843, page 368, it is stated that, renunciation of Hinduism or Muhammadanism being regarded by Hindu and Muhammadan law and usage as tantamount to civil and legal death, the remaining party is at liberty to treat the other as repudiated and divorced, so that the Christian convert is entitled to avail himself of the Hindu or Muhammadan law, and regard his or her voluntary renunciation of ancestral faith as of itself releasing him or her from the obligations of the previous conjugal alliance, or as rendering

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him or her free at once to contract another. The alteration proposed to be made in law is to enable the convert, if deserted or repudiated, to summon the unconverted party before a Court to ascertain whether he repudiates the marriage or not. It appears to me that the proposition is reasonable, and that the convert ought not to be left in a state of suspense as to the intentions of the other to repudiate the marriage or not.

12. But, to whatever decision the Governor General in Council may come upon this important question, it appears to me that the Government of India would be placing itself in a false position by asking the different missionary bodies for a sketch of their notions. I confess I do not see to whom any official application to the missionary bodies is to be addressed or how their opinions are to be obtained, and I think it very undesirable that they should be discussing in conference subjects submitted for their opinion by Government. It appears to me that the Government have ample means at present for forming their opinion upon these very difficult subjects. No one has a greater respect for the missionaries than I have, but I see no reason why they, in preference to Church Establishment of the Government, should be consulted with reference to the marriage and divorce of Native Christians, involving the question whether the law, as it at present stands with regard to marriages within certain degrees of affinity, should be released, and how and under what circumstances divorces for adultery should be obtainable. Their opinions with regard to divorce in cases of conversions may be gathered from the petition to which I have already referred and the paper which accompanied the petition, and they will be found in the Report of the Indian Law Commissioners of 1843, page 346.

13. It is stated by Mr. Parry that, from the commencement of the Christian missions in India, Native converts in Christianity have been in the habit of having recourse to divorce on account of adultery when the guilt has been proved before the minister and the congregation. Such a divorce cannot of course be sanctioned by law, and, if any Act be passed, the power of granting divorces should, I think, be left to such of the Civil Courts with such power of appeal as may be ultimately determined upon.

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## No. 12.

### ADMISSION TO PRACTISE OF ATTORNEYS OF SUPREME COURTS.

*(25th August, 1853.)*

I AM of opinion that great benefit is likely to arise from allowing Attorneys of the Supreme Courts to practise in the Courts of the East India Company.

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2. I do not feel the force of the arguments urged by the majority of the Judges against granting the prayer of Mr. Newmarch's Memorial. Most of those reasons would apply with as much, if not with greater, force to the admission of a Barrister. An Attorney cannot, according to the rules of the Courts, be admitted without undergoing an examination, but no examination is necessary as a preliminary to a call to the bar, nor is any particular course of study necessary. The admission of Attorneys, like all other competition, may, to some extent, be prejudicial to the interests of the Native pleaders, but I have no apprehension of its causing the entire withdrawal of the Native pleaders.

3. I think there is no risk of inconvenience with reference to the proposed amalgamation of the Courts. Surely no amalgamation can ever be effected which will dispense with the Native pleaders in cases now cognizable by the Company's Courts, and it is not proposed to put the Attorneys in any better position than the Native pleaders.

4. I, therefore, think that the law should be altered at once. A very short Act will be sufficient for the purpose, and I will prepare one if it be determined to legislate. At all events, I would at once repeal s. 16 of Regulation 27, 1814, as recommended by all the Judges of the Sudder Court.

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## No. 13.

### Place of sitting of Political Courts.

*(6th October, 1853.)*

The object of this reference is, I presume, to obtain the opinion of the Government of India for the guidance of the Government of Bombay as to the necessity of issuing orders to the officers presiding over the Political Courts with reference to the places wherein they should hold their sittings.

In that view, it seems unobjectionable for the Supreme Government to depart from the ordinary rule of refusing to express its opinion upon a point of law, or as to the construction of an Act of the Supreme Government.

2. It appears to me that these Courts ought to sit within the limits of the jurisdiction conferred upon them, and that they cannot lawfully sit within the districts subject to the general Regulations. I think that the Sudder Court was right in holding that the Sessions Judge of Sholapore could not lawfully convict for perjury committed on a trial before the Collector of Sholapore sitting as President of the Political Court of Akulkote within the limits of the jurisdiction of the Sessions Judge of Sholapore. I concur with Mr. Frere in thinking that the Sudder Court could not annul or review a decision of a Political Court, notwithstanding it might be held within a regulation

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district. But it appears to me that such a Court could not within a regulation district lawfully carry into execution a judgment passed by the Court whilst sitting within such district; and that whether it could do so in the district subject to its jurisdiction is a question which must in each case depend upon the law in force within the same. I should observe that Act 5 of 1847 extends to Courts established for the administration of criminal justice in States or territories administered by officers acting under the authority of the East India Company; not to Courts established for the trial of offences committed in such States, which would have been the language of the Act if the Courts so established could sit within the regulation districts for the trial of offences committed within such States. Thus many serious questions might arise if such a Court should carry into execution a sentence passed by the Court whilst sitting within a district subject to the Regulations (especially in a capital case), and the validity of the judgment were called into question in the Supreme Court or even in any of the Courts of the East India Company.

3. By Regulation 13, 1827, section 1, cl. 2, Bombay Code, the functions of criminal justice are to be performed by the Courts designated therein, and I apprehend that within the limits of that Regulation no functions of criminal justice can lawfully be exercised by any other Court unless constituted by some subsequent Regulation or Act of Government. I should also think that, in cases where the Judge is to be assisted by assessors, the assessors should be taken from the district within which the offence is committed. The Regulation, however, does not extend beyond the regulation districts, and, therefore, would not apply to the case suggested by Mr. Frere of a trial at one place for an offence committed at another place, both places being beyond the limits of the Regulations. The validity of such a trial would depend upon the local law in force.

4. There appear to be two classes of Courts called Political Courts, *viz.*, (1) those established by or under the authority of the British Government within the territories of a foreign Prince or State, administered by officers under the authority of the East India Company, such as Mysore, and (2) those established within the territories of the East India Company with jurisdiction within the territories held by Jagheerdars under the East India Company which territories, it seems, are not in strictness the territories of a foreign Prince or State, but form part of the British dominions. The Political Court of Akulkote, with regard to which the present question has arisen, seems to be one of the latter class, Akulkote being of the Jagheeris of Suttara.

5. I presume that the former class of Courts is generally established by virtue of some treaty with the foreign State or by consent of the foreign Prince, as in the case of Baroda, in which a Court has lately been established by the Government of

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Bombay with the consent of the Gaekwar; and that the latter class is established by the Executive Government in cases over which the Jagheerdars have not jurisdiction either by custom or tenure—see recital in Regulation 13, 1830, Bombay Code. In neither case, as it appears to me, can the Court sit beyond the limits of its jurisdiction within a district subject to the Regulations. The Collector of Sholapore, for instance, has no jurisdiction as a Criminal Judge within the jurisdiction of the Sessions Judge of Sholapore, although he may have jurisdiction in revenue matters. His office of Collector of Sholapore is as distinct from that of President of the Political Court of Akulkote as if the two offices were held by different persons. Mr. Frere seems to think that the Collector of Sholapore could punish for perjury committed on a trial before him sitting as President of the Political Court of Akulkote within the jurisdiction of the Sessions Judge of Sholapore. But I agree with Mr. Remington in thinking that he would clearly have no jurisdiction over an offence committed within the jurisdiction of the Sessions Judge, and the act, being committed in a district subject to the Regulations, could not be perjury, if tried by the Collector, and not perjury (as it has been held) if tried by the Sessions Judge. Thus the anomaly would arise (if the Collector can hold his Court at Sholapore) of a Criminal Court sitting in a place in which all the witnesses may commit perjury with impunity. But if the Collector sits within the limits of his jurisdiction, he might try a witness for perjury as well as for any other offence committed within such limits.

6. It seems to have been assumed that Act I of 1849, authorizes the appointment of Courts within the British territories for the trial of offences committed in the territories of a foreign Prince or State. But I do not understand that to be the meaning of the Act. The object seems to have been to provide for the punishment of offences committed in foreign States. The Act does not extend to offences committed within the British territories, nor does it make any distinction between regulation and non-regulation districts. Section 2 renders certain persons therein described amenable to the law for all offences committed *within the territory of any foreign Prince or State.* By section 4 the Government may order the trial to be had before *one of the established Courts of Criminal Judicature which would be competent to try the person charged with the offence, if it had been committed within the British territories.* By section 5, when the offence is charged to have been committed *in the territory of any foreign Prince or State administered by officers acting under the authority of the East India Company, in which territory a Court competent to try the person charged for the offence is established by authority of the Governor General of India in Council,* the Government may order such person to be conveyed in custody *out of the British*

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*territories for the purpose of delivering him up for trial before such Court.*

7. Section 5 does not authorize the establishment of Courts in the territories of a foreign Prince or State; nor could it do so, inasmuch as the Government cannot legislate except for the territories in the possession and under the Government of the East India Company. It merely contemplates the existence of such Courts in the territories of some foreign Princes, and proceeds upon the principle of providing for the surrender of the offender to the foreign authority, if the Government think fit, in those cases in which, from the constitution of the Courts, there is a guarantee—see Mr. Bethune's Minute with reference to Act 1 of 1849—that justice will be properly administered. In other cases the offender is to be sent for trial under section 4 before one of the established Courts of Criminal Judicature which would be competent to try the person charged for the offence, if it had been committed within the British territories. The non-regulation provinces under the Government of India are as much British territories as those subject to the Regulations, though they are not governed by the same laws. But I apprehend that the Judge of a non-regulation district must hold his Court within the limits of his own jurisdiction, and not within the jurisdiction of a Sessions Judge of a zilla.

8. If there are any Jagheerdars holding under the East India Company whose possessions are to be considered the territories of a foreign Prince or State, it seems clear that, under the provisions of section 5, the Court should be held in those territories.

9. In the present state of the law, therefore, it appears to me that the Judges of the Political Courts should hold their sittings within the limits of the jurisdiction assigned to their respective Courts.

10. I observe that the Notification of the 22nd January does not in most cases define the territories in respect of which the Courts are to have jurisdiction. For instance, in the case of Sholapore, it merely states that the Collector, aided in capital cases by assessors, is recognized as a tribunal duly constituted within the meaning of Act I of 1849; but it does not state in respect of what territories his jurisdiction is recognized. I presume the orders in Council, by which the Courts are established, define their respective jurisdictions. The Courts are stated in the notification to be Courts established for the trial of offences committed beyond the limits of the British Regulation Provinces; which may or may not include the territories of a foreign Prince or State. So far as these Courts exercise jurisdiction in the British territories, though not subject to the Regulations, they appear to me to form part of the established Courts of the country. It is only in so far as they are authorized



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to exercise jurisdiction in foreign States that they fall within the Act I of 1849, section 5.

## No. 14.

### APPELLATE PROCEDURE.

*(12th October, 1853.)*

THE Sudder Court, North-Western Provinces, still retain the opinion which they have already expressed that the law is not calculated to secure the object which it has in view, *viz.*, the shortening and simplifying of the existing procedure in regular appeals. On the other hand, the Sudder Court at Calcutta concur in upholding the principal and main features of the law, and continue to anticipate important advantages as likely to result from it.

2. The Sudder Court, North-Western Provinces, would prefer to alter the existing law as enacted in Act 4 of 1850, and, instead of allowing the petition of appeal to be presented to the lower Court without specifying the grounds of objection at the time, would require the petition to be presented to the Sudder Court and the grounds of objection to be specified at the time of preferring it.

3. It appears to me preferable to leave the draft Act as it stands in this respect, which merely continues the law as it at present exists.

4. There might be considerable weight in the arguments urged by Mr. Harrington, in which the other Members of the Court concur, in support of his proposed alteration of the law, if the litigant parties could obtain the best advice and assistance previously to appealing. But this is not the case.

5. The original documents and evidence remain in the lower Court, until after the appeal has been presented and the record removed to the Sudder Court, and I think the parties would be placed under great disadvantage if they were compelled to specify the objections by which they are to be bound, before the pleaders who are to conduct the case in the Appellate Court have had the advantage of inspecting the original documents and the evidence adduced in the trial and fully considering the case. I would, therefore, prefer to let sections 2 and 3 of the Act stand with some slight alterations, which I have made therein.

6. The Sudder Court, North-Western Provinces, object to the double notice to the respondent, one in the lower Court, and one in the Sudder Court, after the record has been transmitted. It appears to me that there is no weight in this objection, as the second notice can do no harm and is not attended with any trouble or expense. It is a mere notice to be affixed in the Court-house of the Sudder Court, and does not require personal service.

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7. Both Courts approve of the principle of sections 4 and 5. I have made some alterations in pursuance of the suggestions of the Western Court.

8. The Western Court objects to sections 6, 7, 8, 9 and 10, which allow the parties to state in separate papers matters which, under the existing law, they say would be confined to a single pleading. These sections require the parties to state their grounds of objection to the decision of the lower Court, distinctly and concisely, and without any argument or narrative, and allow them the option of filing a separate paper containing a detail of their reasons and arguments in support of their objection. I confess I see no occasion for the second paper. All that is requisite is, that the parties should state concisely the points which they mean to urge, in order that their opponents may prepare themselves for the argument of the case, and that the Court may be apprised of the points which are intended to be brought under their consideration. The argument is, in my opinion, better left to be addressed orally to the Court at the time of the hearing; but, if any arguments or detailed reasons in support of the objections are to be allowed to be filed, I think they should be on separate papers which will tend to prevent the confusion and prolixity which arises from mixing up the points and the arguments in support of them, instead of keeping them clear and distinct. Nothing tends more to simplify a case than to ascertain clearly what are the points in dispute, and I cannot conceive that there can be any difficulty in stating the points to be argued and the arguments in support of them in separate papers.

9. Mr. Jackson, Mr. Colvin and Mr. Dunbar, would not allow the parties to file detailed reasons at all. Sir Robert Barlow and Mr. Mills thought that the parties should have the option of doing so if they pleased. Mr. Colvin did not strongly object to their being allowed to do so, and thus, I presume, the Act, as originally prepared, allowed this option.

10. I quite agree with Mr. Jackson, Mr. Colvin and Mr. Dunbar in thinking that the option ought not to be allowed. There is no more reason for allowing parties to file written arguments in support of their respective objections in appeal than there is for allowing written arguments in support of every pleading filed in an original suit. The effect of allowing written arguments to be filed is to encumber the record, and to occupy the time of the Judges unnecessarily in reading a written argument in addition to listening to an oral one. I, therefore, propose to omit those portions of the Act which allow the option of filing detailed reasons, *viz.*, the latter part of section 6 and the whole of section 10. I have heard it urged in support of allowing the option, that, if the arguments are put on record, they will go before the Privy Council in case of a further appeal. But there is no weight in that argument. If the case is appealed



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to England, the Pleaders here may write out an argument in support of their respective cases, which may be sent to England as instruction for the Counsel who may argue the case there.

11. The Western Court and the British Indian Association object to those clauses which allow an appeal on points of law only. I agree and think that it will be in many cases attended with much inconvenience and delay; and would therefore omit them. I should however state that Mr. Colvin strongly advocates their retention.

12. With regard to clause 16, the Sudder Court, North-Western Provinces, recommend that it should be introduced with regard to all the Courts. I think that this is desirable, and have, therefore, drawn a short Act to that effect.

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## No. 15.

### SPECIAL APPEALS.

*(10th November, 1853.)*

I THINK this Act may be passed as altered.

I have adopted most of the suggestions of the Sudder Court at Calcutta. As to suggestion No. 1, however, I think the Act should stand as it was originally prepared and published; otherwise an admitted appeal may be determined according to a law different to that which was in force at the time of the appeal and upon the strength of which the appeal may have been presented.

2. I have not adopted the suggestion for reducing the time for appealing or applying for a review under section 9 to six weeks. The Act as proposed originally by the Sudder Court fixed three months as the limit, and it has been so published. Probably six weeks as now proposed may be sufficient, but as the present law allows three months, and the Act has been so published, I think the proposed alteration had better be left until the new Code of Procedure.

3. The Sudder Court of Bombay propose to introduce the words "equity, justice and good conscience" into clause 1, section 4. It appears to me that this is not necessary; for a decision contrary to equity, justice and good conscience is, in the absence of any specific law or usage, contrary to law—see Bombay Code, Regulation 4, 1827, Chapter 6, section 26.

4. With respect to suggestion No. 2 of the Bombay Court, it appears to me that, if the usage has the force of law, it ought to be acted upon until altered by the Legislature. If it has not the force of law, the present Act will not apply. The words "usage which might be allowed the force of law" proposed by the Court to be inserted, appear to me to be too indefinite to be adopted.

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5. As to suggestion No. 3, it is matter of evidence whether a document is proved or not, but the misconstruction of a proved document is clearly matter of law. Clause 2, section 4, was introduced merely to prevent any doubts upon the subject.

6. As to suggestion No. 5, paragraph 6, it appears to me that the present Act does not alter the law as it stands at present under Act 3 of 1843, section 3; but I think there is a good reason for the suggestion, and I have adopted it. I have also adopted the suggestions Nos. 7 and 8.

7. With respect to the suggestion of the Madras Court that admitted special appeals should be heard by two Judges instead of three, it appears to me that it will be better to pass the Act as it is, making the law uniform in the three Presidencies. If it should appear that business is impeded by this provision of the Act, it may be amended in the new Code of Procedure.

8. The Government of Madras do not concur with the Court to the full extent, but suggest that it may be a matter for consideration whether in cases in which appeals are preferred upon any ground except those mentioned in section 4, clause 1, the appeal might not be heard by two Judges. It does not appear to me that there is any valid ground for making the distinction suggested by the Government of Madras, especially as the final decision may be upon any point.

9. The suggestion No. 4 of the Bombay Court in which the Government of Bombay fully concur, and that of the British Indian Association, paragraph 3, involve a principle of considerable importance. It is in substance whether a special appeal should not lie in cases where the Court of regular appeal reverses the finding of a lower Court upon a question of fact. I certainly think that some remedy ought to be found for the evil pointed out. I spoke to Mr. Colvin upon the subject when the Act first came before me, but he considered that it would be quite impossible for the Sudder Courts to get through their business if a special appeal should be allowed upon matter of fact, even though it should be allowed only in cases where there was a difference in opinion between the two lower Courts. To allow the Court to grant a new trial upon matter of fact would involve the necessity of examining all the evidence, and would occupy as much of the time of the Courts as if they were themselves to decide upon the evidence. I do not propose to alter the present Act, but I think the matter is one which should be provided for by the new Code. If a zilla Judge sitting as a Court of original jurisdiction decides a matter of fact after having seen and heard all the witnesses, the Sudder Court may reverse his decision upon a regular appeal. But, if a Judge sitting as a Court of regular appeal reverses the decision of a lower Court upon a question of fact, his decision is final, though the lower Court has the advantage, which he has

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not, of seeing and hearing the witnesses and judging of the weight which ought to be attached to their evidence. This is certainly an anomaly. In the former case, the Judge's decision is not opposed to that of any other Court; he has the advantage of judging of the truth or falsehood of the evidence from the demeanour of the witnesses; yet his decision may be reversed by the Sudder Court, which has not the same advantage. In the latter case, the Judge's decision is opposed to that of the lower Court, he has not the same advantage as the lower Court of seeing and hearing the witnesses; yet the Sudder Court, which is in as good a position as the Judge to form an opinion as to the value of the evidence, cannot enter into the question or decide which of the two conflicting decisions is the right one. The Judge's decision is final. The same observations apply to decisions of Principal Sudder Ameens.

10. The evils attendant upon the system are forcibly pointed out in the letter of Mr. Howard, the Legal Remembrancer at Bombay, dated the 5th April, 1852, which also contains many excellent remarks upon the subject of the law relating to special appeals. The above letter, together with the opinion of the Advocate General of Bombay and of the Sudder Court of that Presidency and the Minutes of the Right Hon'ble the Governor and the Council of Bombay, were enclosed in a letter from the Secretary to that Government, dated the 8th May, 1852, and are all well worthy of consideration. I would propose, therefore, that these documents and the letter of the Secretary to the Government of Bombay, dated the 29th September, 1853, and its enclosures, be laid before the Commissioners appointed to prepare a new Code of Procedure.

11. Another point to be considered is whether one Judge should have the power of rejecting a special appeal. In my opinion he should not be entrusted with that power. One of the great evils at present complained of is that the Sudder Court, under the law as it now stands, is bound by the reasons given by the Judge in his certificate for admitting the appeal, though they may see other valid grounds for reversing the decision. But the Judge who would refuse to insert in his certificate the valid grounds, would reject the appeal if those grounds alone were brought to his notice, and the same evil which is now complained of would exist. The only difference between refusing to insert the grounds in his certificate and rejecting the appeal is that in the former case the error is discovered when the case comes to be determined without the means of rectifying it, and that in the latter, the error may never be known. In each case the suitor is equally injured. I have, therefore, inserted a clause rendering the order of a second Judge necessary for the rejection of an appeal or the removal of a case.

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12. With regard to paragraph 9 of the letter from the Secretary to the Government of Bombay, dated the 29th September, 1853, I would remark that, under section 2, Regulation 7, 1831, of the Bombay Code, appeals are presented to the zilla Judge, who may refer them for trial to Assistant Judges under the rules contained in Regulation 1, 1830. Without such reference, I apprehend, the Assistant Judges have no power to hear an appeal. By Regulation 1 of 1830, also, an Assistant at the Sudder station has no power to try appeals unless he is invested with such power by the Government. This has already been pointed out by the Sudder Court of that Presidency in paragraph 10 of their letter No. 384 of 1849 (enclosure No. 1 on the letter above referred to), and a suggestion was thereby made for remedying the evil. I see no reason why the obvious abuse pointed out in paragraph 9 above alluded to should continue. I find it stated that nine-tenths of the decisions of the Assistant Judges, when they interfere with the judgments of the native Judges, are themselves reversed or altered upon appeal. This was the case whilst the law of 1843 was considered to allow a second appeal to the Judges from the decision of their Assistants. It seems, however, to be now established that no appeal lies from an Assistant Judge sitting as a Court of regular appeal except to the Sudder Adawlat, and not even to that Court when the decision turns upon a matter of fact.

13. There can be no reason for extending or continuing to inefficient men under section 4, Act I of 1830, the jurisdiction of trying appeals. The present suggestion of the Sudder Court, with which the Government concur, is to allow the Court *to return for trial* cases in which the Appellate Court reverses upon appreciation of evidence alone the decision of the Court of original jurisdiction. It appears to me, however, that this will not obviate the evil pointed out. The evil arises from the incompetency of the Court of regular appeal, and that evil will not be removed by the suggestion proposed. Why should a Court of appeal exist, nine-tenths of whose decisions ought to be reversed or altered whenever they interfere with the decision of the Court of original jurisdiction. It would be far better to make the decision of the Court of first instance final. Why should the Sudder Court be burthened by a number of special appeals from an incompetent Court, for the purpose of enabling them to return the case to the same incompetent Court for retrial or even returning it for trial by the zilla Judge himself.

14. The system of remand is altogether bad. Whenever a Court of appeal can pass a final decision, it should do so. It must not be forgotten that every new decision after a remand is the subject of a new appeal. But if a remand to a competent Court is an evil, how much more would the evil be aggravated by a system which would allow of a remand to a

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Court admitted to be incompetent. The anxiety, vexation and expense to the suitor when he is bandied about between two competent Courts is a great evil, but that evil is greatly aggravated when one of the Courts is incompetent. The intention of the present Act is to prevent a revision on any case in which the Court of appeal can pass a final decision. In most cases where the decision of a Court of original jurisdiction is reversed upon matter of fact, there is sufficient upon record to enable the Sudder Court to decide the case finally. In such case they should do so, and they should never remand any case unless where the finding is so imperfect as to render it impossible for them to pass a final decision.

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## No. 16.

### Law of Evidence.

*(1st March, 1854.)*

I THINK that the law ought not to be altered in the manner proposed by the Sudder Court at Bombay.

2. The substance of that proposal is that the Regulation of the Bombay Code, which requires that evidence shall always be taken in the presence of the prisoner, shall not be applicable to the reception as evidence of the narratives of approvers on trials for belonging to a gang of thugs or dacoits, provided that the narrative shall contain a description of the personal appearance and age of the narrator and of each person named by him as an accomplice.

3. The provisions which are necessary to secure the fair and impartial trial of persons accused of crimes, and to enable them to protect themselves against false evidence, are just as applicable to the crimes of thuggee and dacoity, or of belonging to gangs of thugs or dacoits as to other crimes. If the Legislature could be sure that no false accusation of the crime of thuggee or dacoity would ever be made, the simple accusation should of itself be conclusive of the guilt of the accused. But unfortunately such is not the case, and false accusations of thuggee are as likely to be made as those of any crime.

4. The evidence of accomplices is looked upon with the greatest suspicion, even when it is given in the presence of the accused, and the witness is subject to cross-examination. I cannot, therefore, see any sound principle upon which the narrative of approvers taken in the absence of the accused should be rendered admissible as evidence against persons charged under the special Acts. The more serious the charge the greater is the necessity for watching carefully the evidence in support of it, and of allowing the accused the means of testing it by cross-examination, and this is more especially the

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case where the crime charged is of such enormity that the mere charge almost involuntarily produces an impression unfavourable to the accused. That false accusations of thuggee and dacoity are made and that conspiracies are entered into to accuse innocent persons of the crimes above-mentioned there can be no reasonable doubt.

5. Suppose an approver upon a charge against A states that B, C and D, belonged to the gang. The proposed Act would render such statement admissible against B, C and D, upon a subsequent charge being made against them, though at the time when the statement was made no one had an interest in cross-examining the approver or testing the accuracy of his evidence so far as it related to B, C and D. Every sound principle requires that the approver should attend as a witness upon the trial of B, C and D, and be subject to their cross-examination, especially when we are led to believe that the narratives of approvers are not always taken with that care which is required, and that an approver in many instances receives a certain sum of money for every dacoit he apprehends. Even if such a principle as that proposed by the draft Act could be admitted, I think the second clause which the Sudder Judges consider necessary to prevent collusion between approvers against prisoners, and to enable the Sessions Court to identify the prisoner, would render the Act almost inoperative. I cannot think that a description of the personal appearance and age of a person charged with complicity by a native approver could ever be so satisfactory as to be worthy of much reliance.

6. I think it is admissible to leave the weight to be attached to the evidence of approvers or accomplices to the decison of those who have to decide the case, and for that purpose to repeal clause 2, section 35, Regulation 12 of 1827. This will render the law at Bombay in respect to the evidence of accomplices and approvers the same as it is in England and Bengal. I, therefore, agree in thinking that clause 2, section 35, Regulation 12 of 1827, may be repealed, though I do not think that the acquittals complained of were occasioned by that provision.

7. It appears to me that greater care is necessary in taking the confessions of prisoners and in providing for the proof of them upon the trial. I observe that in one of the cases the prisoners had confessed, but that their confessions were not sufficiently proved, and in another case that the confession had been taken by the Sheristadar, and that there were so many discrepancies in the evidence of the witnesses who attested the confession, that the Judges could not rely upon it. In that case the prisoners were acquitted, notwithstanding their own confession and the evidence of an approver. That duty should always be performed by or under the immediate superintendence of the Magistrate or the Superintendent or Assistant

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Superintendent of Thuggee and Dacoity. In Bengal, there is a Circular Order providing against the objectionable course of allowing the examinations of prisoners to be taken in the Serishta in the Magistrate's absence, and a form of certificate is given which all Magistrates are to sign in cases of confessions before them. If proper precautions are taken to prevent a prisoner from being induced to make a confession by any false hopes or by any threat or promise previously held out to him, and if the confession is properly taken and certified by the Magistrate or Superintendent of Dacoity, I think it is worth consideration whether the confession so made might not be made admissible without further proof, except to identify the prisoner, or at any rate if confirmed by one witness—see 11 & 12 Vict., c. 42, section 18, which provides for the proof of confessions in England. The attesting witnesses now required to confess before Magistrates are merely to prove what takes place when the confession is made, and are no check upon the holding out of improper threats or promises beforehand to induce confession. The witnesses when they attend at the trial appear frequently to contradict each other as to the manner in which the confession was made, and are, therefore, discredited. Sometimes they are not present at all at the trial, and thus the prisoner escapes. I think the Bombay Government might be requested to consult the Sudder Court at Bombay whether they would suggest any and what alterations in the law relating to the mode of taking and proving the confessions of prisoners made before Magistrates or other committing officers.

8. With respect to pardons granted to accomplices, I would also observe that in Bombay an absolute pardon seems to be always granted previously to the examination of the accomplice, and it seems to be the opinion of the Sudder Judges that a pardon granted to an accomplice is irrecoverable even though the promise upon which it is granted is violated. I think it would probably be desirous to put such pardons at Bombay upon the same footing as they are in Bengal. In the latter Presidency, the pardons are conditional, and the Sessions Judge or the Sudder Court may direct the commitment of any person to whom such a pardon is granted, if it appear that he has not conformed to the condition under which it was offered, by wilfully concealing anything essential or by giving false evidence or information with a view to the conviction of an innocent person. See Regulation 10, 1824, section 5, clause 1.

9. In the Bengal Presidency also a qualified pardon extending only to exemption from capital punishment and transportation and to indulgence in confinement may be offered to Thugs and Dacoits. But the proposed approver must invariably be committed for trial on the charge of belonging to a gang of Thugs or Dacoits, and it is explained to him that, if he pleads

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guilty to that minor offence, he will not be put upon his trial upon any capital charge. In such case the approver is liable to be imprisoned for life, and his evidence, therefore, may always be obtained on any subsequent trial. I think it would be advisable to consult the Sudder Court at Bombay whether such a system would not be an improvement upon that at present in force in Bombay.

10. I think there is a misunderstanding as to the law of Bengal with respect to the admission in evidence of the narratives of approvers. I find it stated that the evidence of witnesses for the prosecution cannot be taken in the absence of the accused.

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## No. 17.

### NAVAL COURTS-MARTIAL.

*(14th June, 1854.)*

I AM clearly of opinion that it is not necessary in the case of a trial by Naval Court-martial for the loss of a ship that all the officers and crew who were on board at the time, and who escaped from the wreck should be arraigned, and that there is no rule which renders the presence of the whole of such officers and crew essential either to the legality of the proceedings or to the ends of justice.

2. The gist of the offence is wilfulness, negligence or other default by which the loss of the ship was caused, *see article 26, Act 12, 1844,* and it seems to be contrary to reason to suppose that it is necessary to arraign upon the charge of wilfulness, negligence or default every officer and member of the crew from the highest to the lowest without having any probable cause for supposing that he was guilty. It appears also to me to be equally contrary to reason to require the presence of every member of the crew at the trial for the purpose of giving evidence when there is no ground to suppose that they can give any material evidence in the case, and when their attendance cannot be obtained without great detriment and injury to the public service. I therefore concur in the view which the Governor General has taken of the case.

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## No. 18.

### FEES CLAIMED BY PERSIAN CONSUL AT BOMBAY.

*(28th June, 1854.)*

I DO not agree with the Advocate General of Bombay that the right claimed by the Persian Consul is in contravention of the Treaty of 28th October, 1841. That treaty allows British merchants to carry their goods into Persia and the merchants

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of Persia to carry their goods into the British territories on payment of the same amount of custom duties as is levied on merchandize imported by merchants of the most favoured European nations.

2. The first of the supposed exactions is a fee of twelve rupees on all vessels whether *British* or foreign taking export cargo to a Persian port for which a permit is granted under the Consul's seal. As these fees are said to be taken from Commanders of Buglas trading to the Persian Gulf, I should apprehend very few of them are British vessels, though, so far as the treaty is concerned, I do not think that it makes much difference. The Persian Consul says (and I do not see that he is contradicted) "I compel no one to come either to receive or register documents at my office, but every time that the Nacodahs or any other persons come to receive or register such documents, which they believe they stand in need of, I have the right to levy the fees according to my tariff." It is stated, however, by the Collector of Customs at Bombay that without such permit no vessel can procure cargo, as all Persian *subjects* residing in Bombay previously to shipping merchandize on board any vessel *bound to a Persian port* are ordered by the Consul to satisfy themselves that the Nacodah of such vessel has been furnished with his permit.

3. There is nothing in the treaty which is at variance with such an order.

4. There may be nothing which renders it necessary or advantageous to the Persian merchants to comply with it. There is no law in Bombay by which the Consul could enforce his order there. But there may be some Regulation in Persia which renders it imperative on all Nacodahs of Buglas in which the goods of Persian subjects are imported into Persia from Bombay, to produce the permit of the Consul, or there may be some Regulation which renders it more advantageous to Persian subjects shipping goods for Persia to ship them in a Bugla having a permit from the British Consul. Such a Regulation in Persia affecting goods imported by *Persian* subjects would not be in violation of the treaty.

5. *No. 2.*—The Persian Consul can have no right in Bombay to go on board any vessel that has obtained a port clearance for a Persian port, and neither he nor the person commissioned by him can have any right to enforce such fees in Bombay. But I do not understand why the taking of such fee is in contravention of the treaty. Probably the Nacodah paying the fee has some advantage in the Persian ports upon his arrival there; otherwise I should think he would not pay it. The tariff K and L referred to in the letter from the Collector of Customs at Bombay is not with these papers; otherwise it might throw some light upon the subject.

6. Probably the fees claimed in No. 2 are not authorized by the tariff; they are not expressly alluded to by the Consul.

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7. *No. 3.*—These fees are payable only by Persian merchants; and the taking of them cannot be a contravention of the treaty.

8. Until the 6 Geo. IV, c. 87, was passed, British Consuls were paid principally by fees, and ever since that Act there are many fees which they are entitled to receive from British merchants.

9. I, therefore, would not adopt the course recommended by the Advocate General for Bombay, of addressing the Persian Government on the subject with reference to the above treaty.

10. But it may be advisable to make more specific enquiries at Bombay on the subject of these fees, and ascertain whether they have, in fact, been levied on British vessels taking export cargo to Persia. If so, whether there is any, and what, advantage at the Persian ports derived from having the permit of the Persian Consul in such cases; whether the permit is required when no goods are shipped by *Persian* subjects; whether the fees No. 2 are included in the tariff No. 3; and whether any certificate or other document is granted upon payment of the fee No. 2, and, if so, whether any advantage is derived from the production of the document at the Persian port of discharge.

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## No. 19.

### VOLUNTEER CORPS.

*(31st August, 1854.)*

I THINK that the thanks of Government are due to those gentlemen who have enrolled themselves as members of the Rifle Volunteer Corps at Singapore for the alacrity and unanimity with which they have come forward and offered their services.

2. I agree in thinking that similar corps would be valuable at Moulmein and other sea-port towns, and also in the several Presidency-towns, and at stations where there are a sufficient number of European inhabitants to form such a corps. However inferior they might be to the regular troops, they would be extremely useful for local purposes and setting free the regular troops who upon an emergency might be required elsewhere. I do not anticipate that any emergency is likely to arise which would render the services of Volunteer corps necessary even for local purposes in the Presidency-towns, but I agree with Mr. Grant in thinking that it is too late to raise and discipline a Volunteer corps when its assistance is actually required, and during a time of war it is well to be prepared for every contingency.

3. I, therefore, entirely concur in the measure submitted by the Most Noble the Governor General. My only fear is that the proposal might cause alarm in the public mind, and might lead the Natives to believe that the Government had grounds for apprehending an invasion by Russia.

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## No. 20.

### APPOINTMENT OF MR. REILLY TO OFFICIATE AS CIVIL AND SESSIONS JUDGE OF DINAGEPORE.

(*30th April, 1855.*)

I HAVE read the Minute of my hon'ble colleague Mr. Grant with great attention, and have referred to the several Statutes bearing upon the point, and also to the accompanying papers relative to the eligibility of natives and others not in the covenanted service to hold certain public offices.

2. It appears to me that the office of Civil and Sessions Judge is clearly an office in the Civil line of the Company's service in India, within the meaning of the 33 Geo. 3, c. 52, section 57; and consequently that it ought to be filled, whether temporarily or otherwise, by one of the covenanted Civil Servants belonging to the Presidency. The Legislature makes no distinction between an officiating appointment and any other, and in legal effect there is no difference between an officiating appointment and a permanent one. An officiating Judge is a Judge *pro tempore*, and is entrusted with all the duties and all the powers of a Judge. It has been thought expedient by Parliament to provide for the due qualification of persons to be employed in the Civil service of the Company. They have accordingly provided by law for a certain course of education for that class of officers, and have directed that all vacancies in the Civil line of the Company's service shall be filled up and supplied from amongst the Civil Servants of the Company. I therefore think that the Lieutenant-Governor, by appointing Mr. Reilly to officiate as Civil and Sessions Judge of Dinagepore, acted in violation of the clear and express directions of the Statute, and beyond his power.

3. The appointment, as far as I can learn, appears to be as unprecedented as it is illegal. Appointments like the present would, no doubt, be very popular amongst a certain class of persons; but the greater their popularity, the greater the mischief and inconvenience to which they are likely to give rise. They would naturally unsettle men's minds and lead them to be dissatisfied with the law which limits to a certain class the right to fill permanently offices which others are by such appointments publicly declared to be qualified to fill temporarily, and they would impose upon the Government of India an invidious task in having to rescind them. For these reasons, I concur generally in the remarks of His Honour the President and of my hon'ble colleagues.

4. I do not, however, concur with Mr. Grant in thinking that it would be the best course to allow the appointment to expire naturally. If the appointment is illegal, as I believe it to be, it

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appears to me to be the duty of the Government of India, in the exercise of their controlling power, to direct the Lieutenant-Governor to rescind the appointment and to supply the vacancy according to the directions of the Statute from among the covenanted Civil Servants of the Company. I would, however, as suggested by Mr. Grant, previously to issuing any order, communicate on the subject with the Governor General. Should His Lordship concur in thinking that the appointment is illegal, I think the President in Council should order the Lieutenant-Governor to rescind the appointment, if it shall not have naturally expired before that time, and should also caution him against taking such unprecedented steps in future.

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## No. 21.

### Proposed Rules for Grants-in-aid of Education.

*(11th June, 1855.)*

I CONCUR in the opinions expressed by Mr. Grant. I think it would be advisable to state distinctly in the rules that, in making grants-in-aid, the Government will act upon the principle of observing strict neutrality in regard to religion. I observe that, by rule 3, the examination is to have no reference to religious instruction. But I think this does not go far enough, and that perfect religious neutrality should be observed by Government in making grants-in-aid.

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## No. 22.

### Claims of Mysore Family.

*(18th June, 1855.)*

HAVING read the documents and correspondence connected with this case with great care and attention, it appears to be quite clear that the Mysore Princes have no valid claim whatever under the Partition Treaty of Mysore of 1799. Reading the 1st, 2nd and 6th Articles of the Treaty together, I am of opinion that the East India Company did not engage or intend to bind themselves to provide for the heirs or descendants of Hyder Ali and of Tippoo Sultan for ever, but that they merely engaged to provide for the members of those families who were then in existence. In the first of the separate articles of the Treaty with the Nizam, the stipends are described as appropriated to the maintenance of the *sons, relations and dependants* of the late Hyder Ali and Tippoo Sultan, but no words are used to show that it was the intention of the contracting parties that the stipends were to be continued to the heirs or descendants of such sons or relations. I should have put the above construction upon the words, "The whole

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of the families of the late Hyder Ali, etc.," in the 1st Article of the Treaty of Mysore, if that article had stood alone, but my construction of those words is, I think, strongly corroborated by the fact that by the 2nd Article the Nizam contracted to provide for the support of Meer Kummer-ud-Deen and of his family and relations, and to grant him for that purpose *a personal Jagheer* equal to the annual sum of 70,000 conter Pagodas. Now a Jagheer is in its nature a mere life tenure and not an hereditary one (*see Baillie on Land Tenure, Introductory Essay, p. 451*), and even if any doubt could have existed as to whether an hereditary tenure was intended if the word "Jagheer" had been used alone, there can be no doubt that the Jagheer was intended to be merely for life as the words "a *personal* jagheer" are used.

2. It appears, then, that the Nizam bound himself merely to grant a personal Jagheer, or a life tenure, to Meer Kummer-ud-Deen, and that the amount of the life tenure was deducted from the estimated value of the territory specified in Schedule B which was allotted to the Nizam. This leads to the conclusion that the two lacs of Star Pagodas, which were deducted in like manner from the estimated value of the districts mentioned in Schedule A on account of the provision for the families of Hyder Ali and of Tippoo Sultan, were intended not as a provision for the families and their descendants for ever, but merely for the then existing members.

Further, by the 6th Article of the Treaty, the East India Company were to be at liberty, to make such reductions from the sums allotted by the 1st Article of the Treaty for the maintenance of the families of Hyder Ali and Tippoo Sultan, as might be proper *in consequence of the decease of any member of the said families.* If it had been intended that upon the death of any such member, his issue were to be provided for, one would have expected to find instead of the words "in consequence of the death of any members of the said families" the words "in consequence of the death of any member of the said families without issue or without leaving any child or children" or some other words to that effect.

3. That even if the word "families" in the 1st Article of the Treaty could by any possibility be considered to mean the descendants of Hyder Ali and Tippoo Sultan for ever, a construction which the clear and forcible arguments of our Hon'ble Colleague Mr. Grant have proved to be utterly untenable, there can be no doubt that by the participation of one of the members of the family of Tippoo Sultan in the ~~meeting~~ at Vellore, the East India Company were entirely released from their obligation to provide for that family.

meeting

4. Their contract was with the Nizam, and not with the Mysore family, and it was one of the stipulations of the contract that, in the event of any hostile attempt on the part of the

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said family or of any member of it, against the authority of the contracting parties, etc., the East India Company were to be at liberty to limit or suspend entirely the payment of the whole, or any part of the stipend stipulated to be applied to the maintenance and support of the said families. The event, provided against by that article, happened, and the Company were no longer bound, by any obligation, to provide for a single member of the family. But the liberality of the Company induced them to abstain from acting upon their strict rights, and from visiting upon the innocent members of the family the crime of the guilty member. They never entered nor intended to enter into any new engagement with the Nizam, and it is unreasonable to suppose that either Lord Minto or the East India Company intended to bind themselves, by any contract or pledge, to the Mysore family after the insurrection at Vellore, when, in fact, they were not bound by any such contract or pledge previously entered into with them.

5. There is nothing in Lord Minto's Minute to lead to such a conclusion, or to show that the Government at that time considered themselves bound to extend, for the maintenance of the family, the whole of the two lacs of Star Pagodas; on the contrary, the allowances then fixed fell very far short of the amount.

6. It has also declared explicitly that the settlement, then made, was only for the lives of the then existing Princes, and that on the decease of any of the persons to whom the allowances were then assigned, Government reserved to itself the power of making such provision for their widows' descendants or other members of their families as should be deemed proper under the circumstances then existing. Whatever expectation might have been raised in the minds of any of the Princes who were living at the date of that Minute and to whom allowances were thereby assigned, that upon his death the Government would make a provision for his widow, descendants and other members of his family, there are no reasonable grounds for a similar expectation in the minds of any of their descendants. It was one of the stipulations of that Minute, expressed in the 4th Resolution, that with the exception therein mentioned in favour of the Princes enumerated in the 3rd class, no addition was to be made nor any reduction on account of any change in the numbers composing the families of the Princes to whom allowances were thereby assigned by marriages, births, deaths or otherwise, and I think that it certainly was not the intention at that time, in making provision for the widows and descendants of any of those Princes after his death, the sums allowed for the support of himself and his family during his life should be exceeded.

7. Lord Minto in his Minute says—"It is a very great advantage, if the proposed plan, in point of economy as well as



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convenience, that the whole charge is reduced to a certain invariable amount." But assuming that it was intended that after the death of any one of the Princes to whom an allowance was assigned by Lord Minto's Minute, the same amount should be continued to and divided amongst his widows and descendants for their respective lives, it never could have been intended that before the death of each of such descendants his share should be again sub-divided for the benefit of his widows and children and so on for ever, for by such a sub-division the allowance in the course of a few generations would in all probability be reduced to infinite small amounts.

8. That Lord Minto never could have entertained the idea that every descendant of Tippoo was to be maintained for ever at the expense of the State, is, I think, clear from the following extract from His Lordship's Minute. He says, it cannot but be felt, on the bare statement of the proposition, that to retain twelve families composed at present of upwards of 300 persons and subject to the natural growth of all societies especially when favored by polygamy and an unlimited number of females to retain, I say such a multitude in the condition and to provide for them on the footing of State pensioners of rank must be an undertaking of such difficulty, complexity and embarrassment as to become in the end impracticable. It may be said that the above remark applies, merely to providing for the family on the footing of State pensioners of rank, but the argument applies equally to maintaining them in any manner at the expense of the State.

9. For the above reasons, I entirely concur in the opinions expressed by the Most Noble the Governor General, and I cannot see any reasons for recommending the claim of Prince Gholam Mahomed to the Hon'ble Court for reconsideration, as His Honour the President and my Hon'ble Colleagues also concur with the Governor General. I think a reply should be prepared and sent to Prince Gholam Mahomed and transmitted to the Hon'ble Court as directed by the 9th paragraph of His Lordship's Minute. I agree with my Hon'ble Colleague Mr. Grant in thinking that he should recommend to the Hon'ble Court, that the present system of accounts by which a separate fund is kept upon the books of the Accountant in the name of Mysore Princes should be altered. As to the proposal of the Bengal Government for the gradual reduction of the allowance to the Mysore family, I agree with Mr. Grant in thinking that the rule proposed by the Government of Bengal is too stringent. The rule proposed is this "that no pensions be, under any circumstances, granted to any descendants of the family now unborn, that after a certain date no allowance in the form of a life pension be granted (except in special exceptional cases) exceeding in amount what may be sufficient to secure a decent subsistence, and that applications for commutation of stipends either in

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enjoyment, or in prospect to money payments once for all or in periodical instalments, may be favourably entertained, if made by any member of the family desirous of engaging in any trade or useful pursuit."

10. I think that that part of the rule which relates to applications for commutations is likely to be productive of beneficial results. I also concur in thinking that the rule under which members who have grown up children are allowed in addition to their stipend one-third of its amount should be abrogated. It appears quite contrary to the principle of the 4th Resolution of Lord Minto's Minute. But I agree with Mr. Grant in thinking that the part of the rule proposed by the Bengal Government for consideration, that no pension be granted under any circumstances to any descendants of Tippoo now unborn, and also that part of it which restricts the amount of pensions to be granted after the 1st May, 1860, might operate too harshly upon the issue of a very worthy and excellent member of the family, the Prince Gholam Mahomed.

11. The first part of the proposed rule would exclude from a pension any child of Prince Gholam which might hereafter be born. The second part of the rule might operate so as to frustrate the very natural and reasonable expectations both of Prince Gholam Mahomed and his family under the 6th Resolution of Lord Minto's Minute.

12. Probably as regards the sons of Prince Gholam Mahomed, the words "except in special exceptional cases" in the proposed rule would prevent any actual hardship upon them, and were intended to provide for that and other similar cases, but they would not protect any child of Prince Gholam Mahomed who may be born hereafter. The second part of the rule, even as worded, might cause anxiety and distrust in the mind of Prince Gholam Mahomed as to the course which Government would adopt in the event of his death, for the purpose of making provision for his widow and descendants, as they would not know whether they would be treated as an exceptional one or not, as Prince Gholam Mahomed is the only son of Tippoo now living and the only remaining member of the family for whom provision was expressly made by Lord Minto's Minute. I would have the provision, to be made upon his death, to be settled according to the 6th Resolution of that Minute. Instead of laying down the rule that no pension shall be granted to any descendant of Tippoo now unborn, I should prefer a rule stating that no pension shall be granted to any descendant of Tippoo beyond the 3rd degree either lineally or collaterally. At present there are many members in the 5th degree lineally such as son's son's sons, son's daughter's sons and son's son's daughter, son's daughter's daughters, etc., etc. and collaterally, such as nephew's sons and nephew's daughters and niece's daughters who are in receipt of pensions, and it would hardly be fair to members in



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the 2nd degree who may hereafter have children to treat those children differently to those of other members in the 2nd degree. By the rule above suggested the pensions now payable or which might hereafter be granted to members in the 3rd degree would not be continued to their children. But as some reasonable expectation may be entertained from the manner in which the liberality of the East India Company has hitherto been extended that the widows and children of members in the 3rd degree would not be altogether excluded from deriving any benefit from the fund, and as the allowances to many of the members in the 3rd degree are so small, that they probably cannot have the means of putting their children forward in the world, I would propose that the Government shall be at liberty to grant a pension to the widows of members in the 3rd degree and also to make, either during the parent's lifetime or after his death, an advance to any of their children or issue for the purpose of putting them forward in the world, provided that the advances in favour of any one or more of such children or issue shall not exceed, in the whole, the value in present money, calculated according to the 5 per cent. tables, of a pension for a certain number of Tears, say 21 years, equal in amount to the pension paid to such member in his lifetime, or if any pension be granted to a widow or widows of such members, of a pension for 21 years equal to the difference between any pension or pensions granted to such widow or widows and the pension paid to the member in his lifetime.

13. I would allow pensions payable to members in the 2nd degree to be continued to their children and widows for life, provided that the amount of all the pensions granted to the widows and children of any such member shall not exceed, in the whole, the amount payable to the member in his lifetime.

14. The financial operation of the above scheme would be to continue the whole or a portion of the pension of R2,090 now payable to Prince Gholam Mahomed, to his widows and issue in such proportions as Government may think fit.

15. To allow pensions payable to grandsons or grand-daughters of Tippoo or other members of his family of an equal degree, either lineally or collaterally, to be divided amongst their issue and widows in such proportion as Government may think fit.

And to allow in effect pensions payable to great grandsons and great grand-daughters of Tippoo or other members of his family in the 3rd degree to their issue for 21 years by paying the value thereof immediately upon the death of such member or during his lifetime for the benefit or advancement in life of such children or to allow such pensions to be continued partly to their children for 21 years for their advancement by paying the value of such 21 years' pension immediately or during the life of the parents. In this manner the whole of the pensions to

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the family must cease upon the death of the members with 1st, 2nd and 3rd degree from Tippoo and of their widows, and upon the payment of an amount calculated upon the principle abovementioned for the benefit or advancement in life of their children and which amount could not exceed the value in present money of an annuity for 21 years equal to the amount of the parents' pension. In case of the death of any member in the 3rd degree without widows or issue, his pension will lapse to the State. Looking to the manner in which the liberality of Government has hitherto been extended to the females of the family, I think some reasonable expectation might be disappointed if any difference were made between males and females. I therefore would not make the distinction in that respect suggested by Mr. Grant. The pensions to the Begums and Khawasses should cease upon their death.

16. The above scheme, if approved, might be embodied in the following resolutions:—

1st.—On the decease of Prince Gholam Mahomed, Government may make such provision for his widow, descendants or other members of his family for their lives as shall be deemed proper under the circumstances then existing pursuant to the 6th Resolution contained in the Minute of Lord Minto dated 19th October, 1807.

2nd.—Upon the death of any member of the family of Tippoo related to him in the 2nd degree, either lineally or collaterally, Government may divide the pension payable to such member in his lifetime or such portion thereof as it may think fit amongst his widows and issue in such proportions as the Government may deem proper under all the circumstances then existing. But no provision shall be made for the widows and issue of such member exceeding in the whole the amount of the pension payable to such member during his life.

17. Upon the decease of any member of the family related to Tippoo in the 3rd degree, either lineally or collaterally, the Government may cause the value in present money of an annuity for 21 years equal in amount to the pension payable to such member in his lifetime to be calculated by the 5 per cent. tables and may cause such amount or such part of it as the Government may deem proper to be paid or applied to, or for the benefit or advancement in life of, the children or issue of such member in such proportions and in such manner as the Government may think fit. If it should appear expedient to Government, the amount so paid for the benefit or advancement of any child or issue may be paid in the parent's lifetime instead of paying the sum after his death, the pensions payable to the parent being of course continued to him during

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his lifetime and a reservation being made, if thought expedient, for his widow or any after-born children. If any such member shall leave a widow or widows, Government may allow such widow or widows to enjoy for life such portion of the pension payable to her or their husband during his life as it may deem fit and may order the value of an annuity for 21 years equal in amount to the difference between the annuity or annuities granted to such widow or widows and the pension paid to such member in his lifetime to be ascertained and may apply such amount to or for the benefit or advancement in life of the children or issue of such member in the manner hereinbefore described.

18. All pensions granted to Begums or Khawasses shall terminate after their decease. Should any exceptional case arise, the Government may deal with the same as it may think fit, subject to the sanction of the Hon'ble Court of Directors to be previously obtained. If the above scheme be approved, it may be carried out without increasing the expense at present incurred in support of the family or extending it to any indefinite period. At the same time, I think it ought to satisfy every reasonable expectation entertained by any member of the family arising either from the Minute of Lord Minto or from the manner in which Government has hitherto extended its liberality. I regret that I have detained the papers longer than I intended, but I did not think it right to allow this case to pass without expressing my opinion upon it, or to express that opinion without having carefully studied and considered all these documents and correspondence bearing upon the case.

19. Upon these two points, *viz.*, the alteration of the mode of keeping the accounts and the course to be adopted for the gradual reduction of the allowances to the Mysore Princes, the papers should, I think, be sent to the Most Noble the Governor General, as His Lordship has not as yet expressed any opinion upon the subject except as Governor of Bengal. Probably His Honour the President in Council may think it better that the Secretary should prepare a note upon the latter subject previously to our finally recording minutes thereon or sending the papers to the Most Noble the Governor General.

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## No. 23.

### TRANSIT DUTIES IN SERF-I-KHAS TALOOKS, HYDERABAD.

*(25th June, 1855.)*

WITH reference to the Minute of our Hon'ble Colleague Mr. Grant, dated the 20th instant, I cannot agree with him that

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we may justly claim the right to rule the Serf-i-Khas Talooks exactly as we rule the Jagheers of ordinary Jagheerdars elsewhere. I admit that it may be very inconvenient for one power to have the management of Revenue affairs, and another power the management of the whole administration of the territory in all other respects. But the question is, not what would be most convenient, but what are our just rights under the Treaty of the 18th June, 1853.

2. If it be determined that either by the words of that treaty or by the conversations which passed at the time, the British Government has no right to interfere with the revenue of those talooks, I think we can have no right to interfere, without the consent of the Nizam, even though we may be willing to pay a reasonable compensation. But I think we have right to insist upon the performance of the Commercial Treaty of 1802, and to take into consideration the terms of the treaty in arranging the amount of compensation to be paid, should the Nizam acquiesce in any arrangement. I do not find that that treaty has been altogether unobserved, but I find that we were willing to consider that salt was not an article of trade or merchandize within the meaning of that treaty as contended for on the part of the Nizam, rather than have any question mooted as to opium. I, therefore, think that we should not altogether throw over the treaty of 1802 in our negotiations, but should merely treat it as not extending to salt or opium as matters of trade or merchandize. I would observe with regard to opium that I do not find anything in the treaty, which, even if it extended to opium, would authorize the Nizam to export opium from the British territories without duty. I think the treaty was intended to apply only to the inland or transit duties.

## No. 24.

### GOVERNMENT OF OUDE.*

*(22nd August, 1855.)*

I HAVE read the Minutes of the Most Noble the Governor General, and of my Hon'ble Colleagues with that attention which the importance of the subject demands.

2. No one who reads the report of the Officiating Resident at Lucknow, and the clear and masterly statement of facts contained in the Minute of the Governor General, can fail to be convinced that the people of that fertile but unhappy country are groaning under oppression, that they are subjected without redress to the most fearful atrocities at the hands of officials

* See, too, Minute No. 34, *post*, p. 80.

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and of men in power, and that they are suffering from all the evils consequent on a state of misgovernment, worse, if possible, than no government at all. I, therefore, concur entirely with the Governor General that "the relations which have heretofore existed between the British Government and the State of Oude can no longer be maintained, and that the policy which we have heretofore observed must undergo a total change."

3. The question is what that change shall be, and how it is to be effected.

4. The Governor General is of opinion that the provisions of the Treaty of 1801, as it now stands, are not sufficient to enable the Government of India to apply an adequate remedy to the abuses of the administration of Oude.

5. The high respect which I entertain for the opinions of the Governor General leads me always to express my own opinion with the greatest diffidence when I find it at variance with his.

6. I trust, however, that I shall be able to show that the East India Company have the right to compel the King of Oude to submit to such just and reasonable demands as may be necessary to secure good government for the people of that State.

7. I admit that the intention of all parties to the Treaty of 1801 was that the system of administration, for which stipulation was made by the 6th Article of the Treaty, was to be carried into effect by the officers of the Nawab Vizier. I admit that the Treaty makes no express provision for what is to be done in the event of a breach of any of the engagements contained in it.

8. It is not usual for treaties between nations, any more than contracts between individuals, to provide specifically for what is to be done in the event of a breach of any of the engagements. The fact that such stipulations are unusual is an argument, though not a conclusive one, that they are unnecessary.

9. If a contract between private persons is broken by either party, the other has a right, in some cases, to cancel the contract or to refuse to perform any engagements on his part; but it is entirely at his option to do so or not.

10. If it is to his interest to uphold the contract rather than to declare it at an end, he has a right to resort to a Court of Justice to compel a specific performance of the contract, or to obtain reparation for the breach of it.

11. In like manner if a treaty entered into by two nations be broken by one of them, the injured nation has the option either to consider the treaty at an end or to uphold it, and to insist upon the performance of it, and, if necessary, to resort to force for that purpose. For example, if a nation contracts with another to demolish a particular fort, or not to keep up

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more than a certain number of ships of war or not to navigate particular seas with her ships of war or the like, there is no necessity to declare what shall be the consequence of a breach of the treaty. If the nation which contracts to demolish the fort, or to limit the number of her ships of war, or to confine them to particular seas, violates her contract, the other may justly resort to force and destroy the fort or capture or destroy the ships used in violation of the terms of the treaty. If, after the Treaty of 1801, the Nawab Vizier had refused to surrender to the East India Company the possession of the territories ceded by that treaty, the East India Company might lawfully have resorted to force to obtain the possession of those territories; they would not merely have declared the treaty at an end and refused protection to the State of Oude; but they would, no doubt, have upheld the treaty and enforced the performance of it. In the same manner, I apprehend, they are entitled to act in the present case. I am borne out in the above observations by the following extract from *Vattel, page 213, Chitty's Edition of 1834.* He says:—

"Treaties contain promises that are *perfect* and reciprocal. If one of the allies fails in his engagements, the other may compel him to fulfil them: a *perfect* promise *confers a right* to do so. But, if the latter has no other expedient than that of arms to force his ally to the performance of his promises, *he will sometimes find it more eligible to cancel the promises on his own side also and to dissolve the Treaty.* He has undoubtedly a right to do this, since his promises were made only on condition that the ally should, on his part, execute everything which he had engaged to perform. The party, therefore, who is offended or injured in those particulars which constitute the basis of the treaty, is at liberty to choose the alternative of either compelling a faithless ally to fulfil his engagements, or of declaring the treaty dissolved by his violation of it. *On such an occasion, prudence and wise policy will point out the line of conduct to be pursued.*"

12. It must be borne in mind that whenever a nation resorts to force against a Sovereign or another nation for the purpose of asserting or maintaining her rights, she in fact commences war against such Sovereign or nation. "War" says *Vattel p. 290,* "is that state in which we prosecute our rights by force."

13. It is therefore proper to consider whether the East India Company would be justified in resorting to force, or in other words, to commence war against the King of Oude, to compel him to yield to their just demands.

14. In the passage above quoted from *Vattel,* he says:— "Treaties contain promises that are perfect. If one of the allies fails in his engagements, the other may compel him to fulfil them; a perfect promise confers a right to do so."

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15. At page 302, he says:—"The right of employing force, or making war, belongs to nations no further than is necessary for their own defence, *and for the maintenance of their rights. Now, if any one attacks a nation, or violates her perfect rights, he does her an injury.*' Then, and not till then, that nation has a right to repel the aggressor, and reduce him to reason. Further, she has a right to prevent the intended injury, when she sees herself threatened with it. Let us then say in general, that the foundation, or cause of every *just war is injury, either already done or threatened.*"

16. Elsewhere at page 315, he says:—"After a fruitless application for justice a nation may proceed to a declaration of war, which is then pure and simple. But, to include the whole business in a single act, instead of two separate ones, the demand of justice (called by the Romans *rerum repetitio*) may, if we think proper, be accompanied by a conditional declaration of war, notifying that we will commence hostilities unless we obtain immediate satisfaction on such or such subject. In this case there is no necessity for adding a pure and simple declaration of war, the conditional one sufficing, if the enemy delays giving satisfaction.

17. "If the enemy on either declaration of war, offers equitable conditions of peace, we are bound to refrain from hostilities, for as soon as justice is done to us, that immediately supersedes all right to employ force, which we are not allowed to use, unless for the necessary maintenance of our rights. *To these offers, however, are to be added securities, for we are under no obligation to suffer ourselves to be amused by empty proposals.*"

18. Again at page 306—"When offensive war has for its object the *punishment* of a nation, it ought, like every other war, to be founded on *right* and necessity.

"1. On right—an injury must have been actually received. Injury alone being a just cause of war the reparation of it may be lawfully prosecuted, or if in its nature it be irreparable (the only case in which we are allowed to punish) we are authorized to provide for our own safety, and even for that of other nations, by inflicting on the offender a punishment capable of correcting him, and serving as an example to others.

"2. A war of this kind must have *necessity* to justify it; that is to say, *that, to be lawful, it must be the only remaining mode to obtain a just satisfaction, which implies a reasonable security for the time to come.* If that complete satisfaction be offered or if it may be obtained without a war, the injury is done away, and the right to security no longer authorizes us to seek vengeance for it."

19. The above extracts prove beyond a doubt the following propositions:—

*1st.*—That a nation may obtain a perfect right by contract or treaty.

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*2nd.*—That a breach of a contract or treaty is an injury which confers upon the injured nation a right to resort to force for the purpose of obtaining her rights.

*3rd.*—That when a nation is compelled to resort to force for the recovery of her rights she is entitled to security against future wrongs, and is not bound to accept mere empty proposals.

*4th.*—That a just satisfaction includes a reasonable security for the time to come.

*5th.*—That she is not entitled to proceed to force if the offender is willing to submit to fair and equitable conditions.

20. By the 3rd Article of the Treaty of 1801, the East India Company engaged to defend the territories retained by the Nawab from all foreign and domestic enemies, and by the 6th Article, the Nawab engaged to establish in his dominions such a system of administration to be carried into effect by his own officers as should be conducive to the prosperity of his subjects and calculated to secure the lives and property of the inhabitants.

21. Whatever difference of opinion may exist upon other points, every one must, I think, admit that in spite of advice and remonstrance, in spite of continual warnings and in spite of repeated threats, the King has utterly violated the obligation which he undertook by the 6th Article of the Treaty.

22. When the East India Company bound themselves to protect the Nawab against domestic enemies, the framers of the treaty thought it necessary for the protection of the people to bind him to maintain a proper system of government.

23. By that treaty they obtained a perfect right to have such a government maintained. By the breach of it, they are justly authorized to resort to force to obtain a just satisfaction for the past and a reasonable security for the future.

24. If reasonable security can be obtained without force, satisfaction for the past should not be insisted upon. But if the King refuse to give reasonable security for the good government of the people, he will have no one to blame but himself, and the evil which may result to him will be attributable solely to his own injustice and the violation of a treaty solemnly entered into.

25. This leads me to consider what demand should be made.

26. Of the four proposals suggested by the Governor General in paragraph 57 of His Lordship's Minute, I think the second is the one which should be adopted.

27. In considering this question, I think we should consider not what would be the best for the people of Oude or for the British Government, but what will afford reasonable security that the object and intentions of the framers of the Treaty

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of 1801 will be carried out for the future. Our object is not to punish for the past, but to obtain security for the future.

28. Now it certainly was never the intention of the framers of the Treaty of 1801 that the people of Oude should cease to be subjects of the Rulers of that Province and become subjects of the British Crown; it was the intention to guarantee to the Nawab Vizier and his heirs the possession of the territories which remained to him, together with the exercise of his authority within those dominions: at the same time, it was intended to secure to the people a government which would be conducive to their prosperity, and would afford protection to their lives and property.

29. If any reasonable security could be afforded that such a government could be carried into effect by the officers of the King, I think that notwithstanding the past flagrant breaches of the treaty, we ought to accept such security and to be satisfied with a specific performance of the engagement for the future. But I am perfectly satisfied that no such security can be afforded, and that any proposal to that effect is utterly futile.

30. It is clear that the King is totally unfit by nature, by education, and by his habits for the high and important duties which have devolved upon him.

31. But if the King will consent to vest the whole civil and military administration of his kingdom in the East India Company for ever, to be carried into effect by their officers in his name, I think a sufficient guarantee for the future good government of his kingdom will be obtained without the necessity of deposing him or compelling him to abdicate and to vest the whole of his territories in the British Government. For the strong and conclusive reasons urged by the Governor General from paragraphs 59 to 68 of His Lordship's Minute, I am of opinion that nothing less than the second project proposed by His Lordship will be sufficient, and for the above reasons, in addition to those which have been urged by the Governor General in paragraph 59, I think that nothing more is *necessary*, and consequently that any further demand would be unjust. My Hon'ble Colleague Mr. Grant in his very valuable Minute has argued that the King of Oude is not an independent Sovereign, that Oude is merely a Province, and that the Nawab was a mere Subadar or Governor of that Province. It is not necessary to discuss, in the present Minute, whether the Nawab, prior to the Treaty of 1801, was or was not a mere Viceroy or Governor, liable to be removed at any time by the East India Company as the Representative of the Emperors. Whatever might have been the case prior to the Treaty of 1801, I cannot think that, after that treaty was entered into, he could have been removed by the East India Company from the Government of the territories which were confirmed to him by that treaty so long as he

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continued to observe the engagements which he thereby entered into. He has broken those engagements it is true, and, therefore, in strictness, he is not now entitled to avail himself of the provisions to the treaty.

32. The consent of the Company to allow him to assume the title of King was of course dependent upon any rights that might accrue to them from his non-observance of existing treaties. The King may, therefore, in this view of the case, have placed himself at the mercy of the East India Company by the non-observance of the engagements contained in the Treaty of 1801; but I do not think that it would be just or generous to inflict upon him any further punishment than may be necessary to secure the fulfilment of the spirit of the 6th Article of the Treaty, and to establish, for the people of Oude, a good government upon a sound and substantial foundation. For these reasons, I concur with the Governor General in advising that the Province of Oude should not be declared to be British territory; and I would humbly recommend to the Hon'ble Court of Directors the adoption of the measures proposed in the second project specified in the Minute of the Governor General.

33. If the Hon'ble Court of Directors should resolve to adopt that measure, I think that no pecuniary benefit should be derived by the East India Company. I therefore cannot recommend that any part of the revenues of Oude should be applied to the payment of the military administration of the Province.

34. By the 1st Article of the Treaty of 1801, the Nawab Vizier ceded to the East India Company, in perpetual sovereignty, certain portions of his territorial possessions, amounting, in the gross revenue, to one crore and thirty-five lakhs of rupees in commutation of the subsidy which His Excellency had, by the Treaty of 1798, agreed to pay to the East India Company.

35. In consideration of that cession of territory, the East India Company agreed to defend the territories remaining in his possession against all foreign and domestic enemies, and by Article 5, it was expressly declared that the territorial cession being in lieu of the subsidy and of all expenses on account of the company's defensive engagements with His Excellency no demand whatever should be made upon the Treasury of His Excellency on account of expenses which the Honourable Company might incur, by assembling forces to repel the attack or menaced attack of a foreign enemy, on account of the detachment attached to His Excellency's person, on account of troops which might occasionally be furnished for suppressing rebellions or disorders in His Excellency's territories, on account of any future change of military stations, or on account of failures in the resources of the ceded districts, arising from unfavorable

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seasons, the calamities of war, or any other cause whatsoever. It should be borne in mind that if the second project be adopted, the people of Oude will remain subjects of the present King, that the Province will not be annexed, and will form no part of the British territories, that the people of that State will have no interest in, nor derive any benefit from, the general revenues of the Company's territories. It should be remembered also that the breaches by the King of Oude of the 6th Article of the Treaty of 1801, of which the Honourable Company have such just reason to complain, were rather the misfortune than the fault of the people.

It is for their sake, and for their sake alone, that interference has become necessary. It would, therefore, I think, be unfair to impose upon the revenues of the country any burthens which they would not have had to bear if the engagement of the treaty had been fully and fairly fulfilled by the King. For these reasons, I would not subject them to the payment of the military expenses which ought to be borne by the revenues of the provinces which were ceded by the 1st Article of the Treaty of 1801. For the same reason, I would not place the residue of the revenues at the disposal of the East India Company, but would leave them to be disposed of entirely for the benefit of the people of the Province. The whole expenses of the civil administration of the country should of course be a charge upon the revenues. If any portion of the general expenses of the Government of India can be fairly allotted to the Province as part of the civil administration of the country, I see no objection, but I think that there will be great difficulty in fixing what portion of those expenses ought to be debited to Oude, and rather than give rise to any misunderstanding or open a door to any reasonable ground of complaint upon that subject, I would not charge any part of those expenses to the Province of Oude. This point, however, may be reserved for future consideration, and will not at all necessitate any alteration in the wording of the treaty proposed by the Governor General to be submitted to the King for his sanction. I do not see any necessity to annul former treaties except so much of Article 6 of the Treaty of 1801 as may be inconsistent with the project proposed for conducting the future government of the country, as our title to the Provinces ceded by the Treaty of 1801 depends upon that treaty. I would rather uphold it than declare it to be annulled. I would make the proposed treaty binding upon the heirs and successors of the King.

36. The provisions for His Majesty's family, not being heirs to the throne should, I think, be granted for life only, subject to be renewed at the option of the East India Company in such cases and in such proportions as they may consider expedient, and the provision for the heirs of the King should be so restricted as to include only heirs to the throne so as to exclude

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heirs who may be adopted without the consent of the Government of India, and who might become entitled to the allowance though the State might lapse.

37. I am of opinion that the King should not be allowed to exercise any jurisdiction or powers of government even within the walls or demesnes of his own palace. He has shown himself so utterly unfit to be trusted with any of the powers of government, that I would exclude him altogether from such an important trust.

38. I would by no means allow the King to exercise any option as to whether he will accept the terms offered to him or not, nor can I recommend that, under any circumstances, the Resident should quit the territories, or that troops should be withdrawn. If the King be allowed the option of submitting to the terms which may be proposed or of having the troops withdrawn, he may be ill-advised and elect the latter alternative, and the departure of the Resident and the withdrawal of the troops would probably be a signal for the commencement of a scene of anarchy and oppression that we should long have to deplore.

39. I think it would be inexpedient for the East India Company to attempt to conduct a government by its own officers in the name of the King without his consent. If, therefore, the Hon'ble Court should determine to propose the second project, and the King should refuse to accept the terms offered, I should recommend the East India Company to exercise that power which, I believe, is, in strictness, vested in them in consequence of the violation of the treaty, and to remove the King and his heirs for ever from the throne of which he has proved himself so unworthy an occupant and from the title which he has so entirely disgraced. I do not think it likely that the King will be so unwise as to refuse submission when he is aware of the consequences to which his refusal will subject him, but should he do so, he will be the cause, and the only cause, of his own misfortune and disgrace.*

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## No. 25.

### PUNISHMENT OF MURDERERS OF ALIEN FRIENDS IN TRIBAL TERRITORY.

*(28th August, 1855.)*

Murder of the Reverend Messrs. Krick and Bourry.

THE trial of the prisoner was held before Captain Dalton, Principal Assistant Commissioner, and Officiating Magistrate of Luckimpore and a jury. The trial took place under the special order of Government. The prisoner was found guilty upon evidence which, independently of

* See, too, Minute No. 34, *post*, p. 80.

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his own confession, leaves no doubt of his guilt. Captain Dalton recommends that he be imprisoned in transportation beyond sea for life. Major Hamilton Velst also recommends that his life be spared, and that he be imprisoned with labour in irons in transportation beyond sea for life.

2. It appears that the prisoner is an independent chief of an uncivilized tribe, occupying a certain portion of territory lying between the British boundary and Thibet. The Reverend gentlemen, of the murder of whom he was guilty, were subjects of France, but they had resided for some time under the protection of the British Government in Assam, and were probably domiciled in India. In the month of March, 1854, they started for the Mishni hills on a mission to Thibet accompanied by a Mishni Chief named Krosha. On arriving at the prisoner's territory they met the prisoner, who refused to allow them to proceed through his territory, saying there is war, and that the death of his son must be avenged, alluding to the death of a son who appears to have been accidentally drowned about three years ago in the Dibroo river at his return from Assam, to which place he and his father had accompanied a Lama. The gentlemen returned and proceeded through the Midgoo-Mishni country avoiding the prisoner's territory, and ultimately arrived at Serni, a Lama village. They had lived there peaceably and on excellent terms with the Thibetans about a month or two, when one evening the prisoner, who had gone into Thibet for the purpose of trade, entered the house in which they were living, accompanied by five or six of his sons and nephews. He accosted Mr. Krick and asked for a cloth, saying "you promised me a cloth but you did not give it me." Monsieur Krick said, "No, I do not owe you anything, go, go. I did not use your road or drink your water. Why should I give you a cloth?" The prisoner arose and without replying, but looking very angry, went away. The prisoner and his party afterwards left the village, and went for the purpose of trade into other Lama villages. In about six days they returned. The prisoner's sons and nephews entered the house of the deceased and sat there for some time. They afterwards left and returned again on the following morning, when the murder was committed in the manner described. The prisoner confesses that the murder was committed by his orders, and there is no doubt that he himself murdered Mr. Bourry. After the murders the prisoner and his party carried away the greater part of the property of the deceased gentlemen, which was subsequently found in the prisoner's house. The murder is correctly described by Captain Dalton as "pre-meditated, unprovoked, cold-blooded and cowardly."

3. It was contended at the trial on behalf of the prisoner that the Government of India had no jurisdiction over the prisoner; that the crime was committed in a foreign territory; that the prisoner was an independent chief, and that the deceased were not subjects of the British Crown.

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4. Though the deceased were aliens and not subjects they were friends; friends who had been living under our protection, and who only a short time before the murder was committed left our territories for the purpose of proceeding on their journey. The prisoner was a chief in the possession of territories bordering upon our own, and though we are not bound to punish him for the injury committed upon our friends, we are, I think, justified in so doing. I think it would be very inexpedient to allow murders to be committed with impunity by uncivilized tribes or their chiefs like the prisoner residing upon our borders, either upon our own subjects or upon the subjects of a friendly State proceeding upon a journey from our territories.

5. I think the British Government had a right, according to the rules of international law, to enter the prisoner's territory, and to make him a prisoner, and having made him a prisoner, I think they are justified in punishing him for his offence. The trial was one not falling within the ordinary jurisdiction of the Court.

6. It was held, in order that Government might be clearly satisfied of the prisoner's guilt before any punishment should be inflicted. The evidence adduced at the trial leaves no doubt upon the subject. The Magistrate who tried the prisoner and the Deputy Commissioner concur in recommending the Government to spare the prisoner's life. The Society to which the deceased belonged have also presented a memorial on the prisoner's behalf. Under all the circumstances of the case, and considering that the prisoner has been removed from his own territories and that he is at a considerable distance from his own tribe and relatives, and that his transportation beyond sea will therefore probably have as good an effect in deterring his own tribe and those of other Mishni chiefs from committing similar crimes upon persons proceeding from the British territories, as if he were punished by death, I think that the recommendations to mercy should be attended to, and that the prisoner should be ordered by Government to be imprisoned in transportation beyond sea for life.

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## No. 26.

### INFORMATION TO NEWSPAPERS.

*(17th September, 1855.)*

I CONCUR in thinking that the question should be referred to the Most Noble the Governor General. I am averse to the establishment of a Government newspaper, and am of opinion that whatever facilities for obtaining information are afforded to any one newspaper ought to be afforded alike to all that are



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properly conducted. I would not interfere with the Local Governments, but would allow each to pursue the course which it may think best. It does not appear that any serious inconvenience has resulted from the measures adopted at Madras and Bombay.

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## No. 27.

### BURIAL OF ROMAN CATHOLIC SOLDIERS.

*(26th October, 1855.)*

WITH the greatest deference to the Bishop of Calcutta I think that His Lordship has acted under a mistaken view of the law of burial.

2. As a general rule, the office of Christian burial ought not to be refused to any person; the only exceptions are those pointed out by the 68th Canon and by the Rubric.

3. The former prohibits the refusal of burial unless the deceased were denounced excommunicated *majori excommunicatione* for some grievous and notorious crime and no man able to testify of his repentance. The latter directs that the burial service is not to be used for any that die unbaptized or excommunicated or have laid violent hands upon themselves.

4. Now excommunication in the meaning of the law of the English Church is not merely an expulsion from the Church of England, but from the Christian Church generally. The person excommunicated is no longer considered as a Christian, but according to the 33rd Article is to be taken "as a heathen and a publican." Such excommunication can be effected only by the sentence of a Court of competent jurisdiction, and not by a Priest of the Church of Rome or by a Minister of the established Church. But, if the Bishop is correct, the refusal of a Roman Catholic Priest to bury a soldier of his own persuasion is, so far as the office of Christian burial is concerned, rendered of the same effect as the sentence of excommunication *majori excommunicatione*, an effect which would not be given to a similar refusal by any Minister of the Church of England.

5. The law of burial was fully considered by Sir John Nichol in the case of *Hemp* v. *Wickes*, in which he pronounced a very learned and elaborate judgment, and laid down the law to the effect above stated. He says—"It is not matter of option, it is not matter of expediency, whether a clergyman shall administer the burial service or refuse it." And in another place, in which he speaks of Papists being permitted to be buried by our Church, he says—"And this is not by putting the body into the ground without the ceremony being performed, but the Minister is to read the service: our Church knowing no such indecency as putting the body into the consecrated ground without the service being at the same time performed." I

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therefore think that a Chaplain of a station, when requested by the Commanding Officer to bury a Roman Catholic soldier, is bound to do so, and that it is not a sufficient ground for refusal that a Roman Catholic Priest present at the station has refused to bury him. It may be presumed, as observed by the Lord Bishop, that the Roman Catholic Priest has good and sufficient reasons for his refusal according to the discipline of his Church; but a Protestant Chaplain has nothing to do with that discipline, and ought to be guided by the directions contained in the Canons and the Rubric. Such refusal by a Roman Catholic Priest cannot disentitle the deceased to be considered as a departed member of the Christian Church universal. If a Roman Catholic Priest refuse burial without sufficient cause according to the discipline of his own Church, his conduct may be subject to inquiry; but his refusal is no justification for a similar refusal by a Protestant Chaplain who is not bound by similar rules. I am of opinion that the rule laid down by the Madras Government was a proper one.

The case had better be referred, as suggested by Mr. Grant, for the opinion of the Most Noble the Governor General.

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## No. 28.

### MARTIAL LAW.*

*(5th November, 1855.)*

THE proposal of His Honour the Lieutenant-Governor is that he may be permitted to declare martial law when the fit time for that purpose in His Honour's judgment shall arrive.

2. In the meantime, as I understand the proposal, warrants are to be issued for the apprehension of the known leaders, to be executed with the aid of the military, and every Santhal and other village in the Damin-i-Koh and adjacent districts is to be searched for plundered property, and, whenever any is found, the headman of the village and the owner of the house are to be apprehended and brought to account. It is only in the event of resistance being offered to the progress of these measures, which are proposed to be carried out by the civil power aided by the military, that the Lieutenant-Governor, as I understand, proposes to place the districts under martial law.

3. I confess it appears to me that a proclamation of martial law should no longer be delayed. I expressed that opinion in a previous Minute when I found that the Santhals, instead of availing themselves of the offer of pardon which had been mercifully held out to them by the Lieutenant-Governor, had again broken out and were carrying on their depredations and excesses in every direction. I am strongly confirmed in the

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* See, too, Minute No. 29, *post*, p. 69.



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opinion which I then expressed by the Minute of the Lieutenant-Governor of the 19th ultimo; for, notwithstanding it appears from that Minute that during the last fortnight the Santhals have been perfectly quiet, either as satiated with plunder or because the districts in their power have been entirely devastated, it also appears from the same Minute that the operations against them have produced but a very partial and inadequate submission; that only one of their four known leaders has been captured; that since the severity of the season obliged the troops to desist from active operations, the Santhals have congregated in the southern parts of Bhaugulpore and the west and northward of Beerbhoom, and have broken out into wilder outrages than ever; that they have devastated every village that had previously escaped their ravages; that they have murdered numbers of the villagers and some of the zemindars, and have driven away the inhabitants by scores to seek shelter in the neighbourhood of our military stations; and that they have had two parganas of Beerbhoom for some time entirely at their mercy. These things, in my opinion, especially in a country like this, require more vigorous measures than those proposed by His Honour the Lieutenant-Governor to be adopted in the first instance, as pointed out in paragraphs 9, 10 and 11 of his Minute. In fact, the Santhals are still in arms against the Government. His Honour has also shown that we cannot afford to lose time, if any active operations are to be carried out with success. Major-General Lloyd has already laid down his plans for the suppression of the rebellion, and the troops are ready to move as soon as the state of the country will permit; and I think it would probably very much tend to disconcert his plans, if the troops were now to be called upon to aid the civil power in the manner proposed. The troops have hitherto been acting in aid of the civil power and, as it were, upon the defensive, but, if aggressive measures are to be taken for the purpose of putting down the insurrection and of compelling the insurgents to submit, I think that it will be proper to subject the districts to martial law previously to the commencement of the operations. I do not think that hitherto we have been under any disadvantage for want of martial law, nor do I think that, if martial law had been proclaimed at first, a single outrage or depredation of those which have been committed, would have been prevented. Martial law could not have accelerated the movement of troops from a distance to the disturbed districts; it could not have improved the roads or rendered them more passable than they were; it could not have rendered malarious jungles healthy; nor would it have warranted the conviction without evidence of a person accused of rebellion.

4. These papers came to me only late on Saturday afternoon, and, as it is of great importance that some proceedings should

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be taken forthwith, I will not at present consider the several matters proposed by the Lieutenant-Governor with reference to the amendment of the law, the disarming of the Santhals, etc.

5. There is no doubt that, so long as martial law is in force, the Santhals may be disarmed without any express law for the purpose. Generally speaking, I think the law upon the subject of rebellion requires amendment. Previously to the proclamation of martial law, I think that some general instructions should be given to General Lloyd for his guidance as to the views and wishes of the Government under whose authority he is to be subject, whether that authority be the Government of India or the Lieutenant-Governor of Bengal.

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## No. 29.

### MARTIAL LAW.*

*(7th November, 1855.)*

I HAD not seen the Minute of His Honour the Lieutenant-Governor of Bengal when I wrote my Minute of the 5th instant.

2. I approve entirely of the course which His Honour the Lieutenant-Governor proposes to adopt upon the establishment of martial law, and of the instructions which he proposes to issue to the military authorities. Indeed, I think that some such instructions are absolutely necessary before martial law is proclaimed.

3. I have carefully perused the proposed proclamation, and it appears to me to be substantially correct, but I would suggest one or two alterations as expedient to be made.

4. First, as the proclamation stands, I think the words "with respect to all persons who may be taken in arms, etc.," over-ride the whole sentence, whereas it appears to me that martial law should be proclaimed generally—see Regulation 10, 1804. It is not necessary merely for the purpose of rendering the persons indicated liable to be tried by court-martial, but also to protect the military from being subject to the civil laws for what they may do in suppressing the rebellion. Suppose it should be necessary to destroy a village deserted by the insurgents in order to prevent their returning to it and making it a stronghold or a store for supplies or the like: the military would be protected by martial law; but such an act would not come within the terms if the proclamation of martial law is limited *in respect of persons taken in arms, etc.* I therefore think that martial law should be established generally in the disturbed districts, and that the military authorities should be instructed to confine their operations to such acts as are necessary for the purpose of reducing the insurgents to complete submission and to put down the insurrection. I do not think that they should burn or destroy

* See, too, Minute No. 28, *ante*, p. 67.

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every Santhal village indiscriminately: these and other similar matters must be left to the humane discretion of the General in command of the troops, subject to the political orders and control of the Government.

5. Secondly, I think that there should be an express authority given to the military authority to try by court-martial the persons specified in the proclamation for the crimes mentioned therein. As the proclamation stands, the powers of the criminal courts are suspended as to certain crimes, and it is declared that persons convicted by court-martial of such crimes will be subject to the punishment of death: but there is no express direction for the trial, as contemplated by the second part of section 2, Regulation 10 of 1804—"and also to direct the immediate trial by courts-martial, etc."

6. Thirdly, I would confine the offences to the three first of those specified in Regulation 10 of 1804. That of aiding and abetting *enemies*, etc., applies, in my opinion, to enemies properly so called, and not to subjects in rebellion, and that also appears to have been the opinion of the Advocate-General (Spankie) in the case of the Cuttack trials. It certainly is not necessary to introduce this offence in the proclamation, which is not in the words of the Regulation, and may, therefore, lead to difficulty, as all persons aiding or abetting in treason or rebellion are principals.

7. Fourthly, the Regulation 10 of 1804 subjects only persons owing allegiance to the British Government to be tried by court-martial for the offences described. The proclamation should follow the Regulation in this respect, both as to the direction for the trial by court-martial and as to the suspension of the powers of the criminal courts.

8. I should be inclined to limit the latter part of the proclamation to a simple notification that persons convicted by court-martial of any of the crimes mentioned therein will be liable to the immediate punishment of death, and I would leave the other part of it to be provided for by the instructions to the General. The proclaimed districts should be clearly described in the proclamation. It seems unnecessary to extend martial law to the whole of the zillahs therein mentioned.

9. I have altered the copy of the proposed proclamation in pencil as I think it might stand. This should be merely suggested to the Lieutenant-Governor. I have not made the above remarks for the sake of mere criticism, but simply to avoid any such questions hereafter as appear to have arisen out of the trials in Cuttack.

10. Every court-martial that may be held under the proclamation should be attended by a Judge Advocate. I think the Lieutenant-Governor should call the attention of the Major-General to that point also.

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11. With reference to paragraph 6 of the Minute of the Lieutenant-Governor, I think that courts-martial cannot pass any sentence short of death for offences tried under Regulation 10 of 1804. I am disposed to think that the Lieutenant-Governor may commute any such sentence. The only question is whether, as the army is under the Government of India, the Lieutenant-Governor can interfere with the sentence of a court-martial. If necessary, such commutations might be sent to the Government of India for confirmation. I do not apprehend any difficulty in this respect, as the offenders are not likely to insist upon the sentences of death being executed. If they should, the case might be soon set at rest by passing an Act in the Legislative Council similar to that which was passed in the case of *Smith* v. *O'Brien*. I agree in the views expressed by the Lieutenant-Governor in paragraph 7, and I think the special commissioners under the Acts referred to could not sentence to death. The whole law requires amendment.

12. I concur in paragraph 8. Major-General Lloyd should not commence military operations until he receives orders from the Lieutenant-Governor. If martial law be proclaimed, Major-General Lloyd should be directed to attend to all political instructions which he may receive from His Honour the Lieutenant-Governor, for otherwise the execution of martial law may very much interfere with the civil government of the districts in which it may be proclaimed, and frustrate the political views of the Lieutenant-Governor. At the same time, I think that Major-General Lloyd and Brigadier Bird should report to the Government of India, and be requested to send duplicate despatches to the Lieutenant-Governor. If the course which Major-General Lloyd proposes to pursue, has not already been made known to the Lieutenant-Governor, I am of opinion that copies of all his despatches upon the subject should be sent to the Lieutenant-Governor. I would especially direct his attention to the Despatch of the 2nd August last, paragraph 3. But I am inclined also to think that some special notice should be taken by the Government of India of that despatch. If special attention be not directed to it before military operations are commenced under martial law, I fear that we shall have a much larger amount of bloodshed than the necessity of the case demands. I have not seen the answer which was sent to that despatch from the Military Department. I think Major-General Lloyd should distinctly understand, lest there should be any misapprehension upon the subject, that it is not the wish or desire of Government to exterminate, but merely to reduce, these ignorant savages to a complete sense of submission with as little bloodshed as possible.

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## No. 30.

### APPOINTMENTS TO BE FILLED BY COVENANTED CIVIL SERVANTS.

*(24th December, 1855.)*

IT appears to me to be unnecessary to enter into all the various topics discussed by the Lieutenant-Governor in his Minute of the 10th August last.

2. I feel no hesitation in expressing my opinion that the Legislative Council has no authority to repeal the 33 Geo. 3, c. 52, section 57; and that, even if they had the power, it would not be proper to exercise it. Parliament as lately as 1853, when providing for the government of India, thought proper to enact that such persons *only* should be admitted to the Civil Service of the Company as should be qualified according to the Regulations which should be framed by the Board of Commissioners for the Affairs of India. The Government of India has already, in paragraph 4 of Mr. Beadon's letter of the 13th July, 1855, conveyed to the Lieutenant-Governor their opinion that it could not have been intended that the high and important duties of the office of Civil and Criminal Judge of a Zillah should be committed to any person not qualified for admission into the Civil Service. I still entertain that opinion, and I consider that I should be acting contrary to my duty as a Member of the Legislative Council by noting in accordance with the recommendation of the Lieutenant-Governor in support of an Act to repeal the 33 Geo. 3, c. 52, section 57. Such an Act, even if the Legislative Council had the power to pass it, would, in my opinion, be in direct opposition to the intentions of Parliament.

3. Upon reference to the speech of Sir Charles Wood of 3rd June, 1853, I find that one great object in proposing a change in the course of education at Haileybury, and in the examination to which students were to be subjected before they should proceed to India, was the improvement of the administration of justice in India. The following is an extract from that speech:—

"We propose that at Haileybury the students shall all receive a sound legal education—I do not mean in the mere technicalities of the profession, but in the principles of jurisprudence, which will enable them to administer any law, whether English, Muhammadan or Hindu, in the principles of the law of evidence, and in the more general branches of legal knowledge. We propose that an improved education of this kind shall be conferred upon every person going to Haileybury. I am in hopes that the present term of two years will be found sufficient for this purpose—at least such is the opinion of the heads of the College: but, if upon experience that period should be found to be too short, it will be extended, *so that no person going thence to India shall go without having had a thorough legal education.*"

4. With such a statement before us and within two years after we have been told in the same speech that "merit and

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merit alone is to be the door of introduction to the Civil Service of India," we are pressed by a strong recommendation by the Lieutenant-Governor that the Act which directs that all vacancies in any of the offices in the Civil line of the Company's service in India shall be filled up from amongst the Civil Servants of the Company, shall be formally rescinded by an Act of the Legislative Council, in consideration of, amongst other things, "the necessity which must speedily arise for extending the employment of the uncovenanted officers." Thus, as soon as Parliament has thrown open the Civil Service to merit and merit alone, the Lieutenant-Governor recommends that the appointments are to be thrown open by the Legislative Council to persons not in the service.

5. I am not sure that some of the offices hitherto confined to the Civil Service might not with advantage be conferred upon persons not belonging to that service, but that is a question which has already been determined by Parliament, and is unnecessary to be discussed here. If any alteration is to be made in that respect, it must be made by Parliament, and not by the Legislative Council. Parliament has thought it right to provide for the education of the Civil Servants of the Company, and to declare that all offices in the Civil line of that service shall be supplied from amongst the Civil Servants belonging to the Presidency where the vacancies shall happen, thus affording a guarantee for the proper education of all persons to whom the duties of those offices shall be entrusted. But the recommendation of the Lieutenant-Governor would destroy one link of the chain by which that guarantee is secured.

6. I think it clear that the Legislative Council has no power to do so. By the 16 & 17 Vict., c. 95, the 3 & 4 Will. 4, c. 85, was continued in force except so far as it was altered thereby. By section 2 of the 3 & 4 Will. 4, c. 85, it was declared that all enactments contained in the 53 Geo. 3, c. 155, or in any other Act, which were limited or might be construed to be limited to continue during the term granted to the Company by the said Act of 53 Geo. 3, so far as the same were in force and not repealed by or repugnant to the enactments contained in the 3 & 4 Will. 4, c. 85, should continue and be in force until the 30th April, 1855; and by the 16 & 17 Vict., such enactments have been continued in force for an indefinite period, except so far as they have been altered thereby. The 33 Geo. 3, c. 52, section 57, which it is now proposed to repeal, was, in my opinion, one of the enactments intended to be continued in force. It formed one of the fundamental principles of the Acts for the Government of India and for the better administration of justice therein. It was continued in force by section 1 of the 53 Geo. 3, c. 155, during the term granted by that Act, and afterwards by section 2 of the 3 & 4 Will. 4, c 85, which has since been continued by the 16 & 17 Vict., c. 95. The

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recommendation to repeal the 33 Geo. 3 necessarily proceeds upon the assumption that it is at present in force; but it is only by virtue of the 3 & 4 Will. 4, c. 85, and the 16 & 17 Vict., c 95, that it is in force, for the term granted by it to the East India Company has long since expired. It appears to me to have been incorporated with the 3 & 4 Will. 4, c. 85, by section 2 of that Act, and to be as much a part of that Act as if it had been actually repeated therein. But by section 43 of the 3 & 4 Will. 4, c. 85, through which the Legislative Council derives its power to legislate, it was expressly enacted that the Governor General in Council should not have the power of making any laws which should in any way suspend or affect any of the provisions of that Act. If I am correct in thinking that the 33 Geo. 3, c. 52, section 57, was incorporated with the 3 & 4 Will. 4, c. 85, it would be varying and affecting that Act to repeal the 33 Geo. 3, c. 52, section 57. Consequently the Legislative Council has no power to do so.

7. For the above reasons, I would not even transmit the recommendation to the Legislative Council for consideration. I cannot concur in the mode of reasoning adopted by His Honour the Lieutenant-Governor: for, even admitting that His Honour is correct in his argument that the words "current duties of the Judge's office" include the duty of deciding causes, and that the Sudder Court had no lawful authority to define the duties of an officer appointed to carry on the current duties of the Judge's office, still it is perfectly clear that in every such appointment made by the Governors of Bengal, since the rules laid down by the Sudder Court in 1835, the words "current duties of the Judge's office" were used in a conventional, and not in the strictly literal, sense which His Honour the Lieutenant-Governor would attach to them. I feel confident that, if any officer appointed to carry on the current duties of a Civil and Sessions Judge had ventured to exercise the full judicial powers of a Judge, and had tried and sentenced a prisoner to 14 years' imprisonment, he would have been severely called to account by Government for so doing, and would not have been allowed, in justification or even in mitigation of his conduct, to rely on the literal sense of the words of his appointment or to contend that the Sudder Court, to which he was subordinate, had exceeded its lawful authority in laying down the rules of 1835. I must, therefore, venture to dispute the position that an appointment to carry on the current duties of the Judge's office is in fact equivalent to an appointment to act as Judge. Indeed, if His Honour's view is correct, there was no reason why he should have appointed Mr. Reilly to act as Judge instead of adopting the usual course of appointing him to carry on the current duties of the office.

8. I cannot agree in the process of reasoning by which His Honour persuaded himself that it was *lawful* as well as *expedient* to appoint an uncovenanted officer to act as Judge, nor do

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I think that His Honour had any fair or reasonable ground for considering that the appointment to act as Judge was lawful because the practice of appointing a Principal Sudder Ameen to carry on the current duties of a Judge had long existed with the knowledge of the highest authorities, and had never been deemed unlawful. His Honour was aware that that practice existed subject to the rules which had in fact, whether lawfully or unlawfully, been laid down by the Sudder Court, and that the appointments had never been considered, either by the officers appointed or by the Government that made the appointments or by the highest authorities to which His Honour alludes as having had knowledge of the practice, to confer upon the officers appointed the full powers of a Sessions Judge which His Honour intended to confer by the appointment in question.

9. It is not necessary to discuss the question whether the appointment of an uncovenanted officer to any of the offices to which allusion is made by the Lieutenant-Governor as having hitherto been made, were legal or not. Each case would have to be separately considered and discussed. But I beg to express my dissent from the doctrine that an illegal appointment to an office, such as that of Postmaster General or Superintendent of Salt Chowkies (assuming for the sake of argument, but not admitting, that the appointment of an uncovenanted officer to either of those offices was illegal) could form any justification or excuse for making an illegal appointment to another office of an entirely different character, to an office which conferred the power of trying for capital offences, of sentencing to imprisonment for 14 years and of sitting as a Court of appeal over the covenanted Magistrate of the district.

10. With reference to the practical questions submitted by the Lieutenant-Governor for the opinion of the Supreme Government, I concur with our Hon'ble Colleague Mr. Grant in the opinions expressed in paragraphs 28, 29 and 30 of his Minute, and I would add, with reference to the office of Collector of Calcutta, that the duties of that office were originally discharged by a Deputy Collector. With reference to paragraphs 3 and 4 of the Minute of the Lieutenant-Governor, I cannot perceive that there was any necessity to call upon the Lieutenant-Governor for an explanation previously to communicating to him the opinion of the Government of India. The question was not whether the Lieutenant Governor should be censured for having made the appointment, but whether the appointment was legal or not. Upon that point, it appears to me that there was no necessity for requesting any explanation or argument from the Lieutenant-Governor. The Government of India, having formed their opinion that the appointment was unprecedented and illegal, conveyed that opinion to the Lieutenant-Governor, and expressed their regret that the appointment should have been made. I cannot think that it would be expedient to lay down a

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rule that in every case in which the Government of India may differ in opinion from the Lieutenant-Governor, they should intimate their opinion to him and call upon him for an explanation before they express that opinion. In the present case there is nothing in the Minute of the Lieutenant-Governor which would have induced me to alter a single word of the letter in which the opinion of the Government of India was conveyed to the Lieutenant-Governor. The Government of India had the same means of forming their opinion upon the question without further explanation as the Hon'ble Court of Directors will have of deciding between the two opinions. There were no facts in dispute upon which explanation was necessary, and everything which the Lieutenant-Governor desires will be attained by complying with the request contained in the last paragraph of Mr. Beadon's letter. Upon making a reference in such cases, the Lieutenant-Governor will always have an opportunity, if he wish it, of submitting his explanations and arguments. The Lieutenant-Governor argues that, if the President in Council had intimated his opinion of the illegality of the appointment sooner, and had called for an explanation, it would have led to the immediate cancelment of the appointment, instead of its going on for some weeks unchallenged to the great probable detriment of justice. The intimation of the opinion of the President in Council and the calling for explanation are two distinct matters although they are mixed up in the passages above referred to. The opinion would have been intimated sooner had it not been thought advisable to refer the matter to the Most Noble the Governor General in consequence of the importance of the principle involved. But I cannot consider that it would have been consistent to have intimated such an opinion as would have induced the Lieutenant-Governor to cancel the appointment immediately, and at the same time to ask for an explanation. If any explanation was necessary, I think that the explanation ought to have been asked for before any opinion was either intimated or expressed. But to intimate or express an opinion in such terms as to induce the Lieutenant-Governor to cancel the appointment immediately, and at the same time to call for an explanation, would be like first deciding a case and afterwards calling for an argument. If the Lieutenant-Governor means that the President in Council should have intimated his opinion as to the illegality of the appointment and have called for an explanation upon the other points referred to by the letter, there were only three points upon which such explanation could be called for. The Lieutenant-Governor might have been asked (1) why the President in Council should not declare the appointment unprecedented; (2) why the President in Council should not express regret that the appointment was made; and (3) why the Lieutenant-Governor should not be requested to make a previous reference to the Government of India previously to his making any appointment

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contrary to established usage. I do not think that explanation or argument upon either of those points was necessary. To have asked for an explanation as to the illegality or the unprecedented nature of the appointment would have caused delay, and would have implied that the President in Council entertained a doubt upon the subject.

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## No. 31.

### WARRANT OF PRECEDENCE.

*(7th January, 1856.)*

SOCIAL precedence is a matter to which, as far as regards myself personally, I attach very little importance; but as the question raised by my hon'ble colleague affects the office which I have the honour to hold, I think it right to make a few remarks.

2. It appears to me that it was not the intention of the Legislature to fix by Act 3 & 4 Will. 4, c. 85, the rank of the four Ordinary Members of the Council of India; that question was left open to be settled by the Crown, and was afterwards settled by Royal Warrant. The rank and precedence of the Commander-in-Chief, when appointed to be an Extraordinary Member of Council, was fixed by section 40 of the 3 & 4 Will. 4, c. 85, which enacted that he should take rank and precedence at the Council board next after the Governor General. Before the Royal Warrant of the 30th January last, Members of the Council of India were appointed to take rank and precedence according to their situation therein. At the date, however, of the Royal Warrant which preceded that of the 30th January last, the fourth Ordinary Member could not sit or vote except at meetings for making laws and regulations. But by the 16 & 17 Vict., c. 95, section 21, the fourth Ordinary Member was in effect invested with the same powers as the other Ordinary Members. It appears to me that the alteration in the wording of the Royal Warrant of the 30th January was intentional, and that, since that Warrant, the fourth Ordinary Member ranks with the other Ordinary Members according to the priority of appointment. I cannot think that it was the intention of the Royal Warrant to confer upon the fourth Ordinary Member social rank differing from his official rank. Precedence may follow the order of official rank, but I apprehend that official rank is the only rank recognized by the Royal Warrant or by the 3 & 4 Will. 4, c. 85, section 62. If it be necessary to support that opinion by argument, I think it is proved by the recital in the Warrant "that it is advisable to regulate the rank and precedence of

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*persons holding appointments in the East Indies.*" When it was enacted by the 3 & 4 Will. 4, c. 85, that there should be four Ordinary Members of the Council, three of whom should be appointed from amongst such persons as should be, or should have been, servants of the Company for at least ten years, and "that the fourth should be appointed from amongst persons who should not be servants of the Company," I do not think that it was the intention of the Legislature that the Member who should be appointed from amongst persons not being servants of the Company, should necessarily always be inferior in rank to the other three; I look upon the words "the fourth Ordinary Member of Council" used in section 40 as a mere designation, in the same manner as if the words "the *other* Ordinary Member of Council" had been used. I find he is afterwards described in the same section as "the last-mentioned Ordinary Member" and subsequently, in section 61, as "the Member of Council by this Act directed to be appointed from amongst persons who shall not be servants of the Company." The word "fourth" was not, therefore, in my opinion, used to denote the rank which the officer should hold relatively to the other Ordinary Members of Council, but for the purpose of distinguishing between the three Members who were to be appointed from amongst the servants of the Company, and the one who was to be appointed with the sanction of the Crown from amongst persons not in the service. It is not my wish or intention to claim social rank before any of my hon'ble colleagues, but I think my Hon'ble Colleague Mr. Dorin is quite right in drawing attention to the point, which he has very fairly raised for an authoritative decision. I concur with him in earnestly hoping that no vacancy may occur which may render a re-construction of section 62 necessary. I do not think that the Royal Warrant is at variance with the Act 3 & 4 Will. 4, c. 85, in directing that the Members of the Supreme Council of India shall take rank and precedence according to priority of appointment, and that the question of rank, if ever it should arise, ought to be determined according to the Royal Warrant.

3. As the Governor General of India is not usually appointed from amongst persons in the service of the Company, there appears to be no objection to the fourth Ordinary Member upon the ground that he is appointed from amongst persons not in the service of the Company, and section 62 draws no distinction between the fourth Ordinary Member and the other three Ordinary Members. Unless, therefore, it be determined that the fourth Ordinary Member is, by virtue of the 3 & 4 Will. 4, c. 85, necessarily inferior in rank to the other three Ordinary Members, and that the Royal Warrant is inconsistent with the Act, it appears to me that the question of rank ought to be determined according to the Royal Warrant.

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## No. 32.

### MOHTARFA TAXES.

*(31st January, 1856.)*

IT appears to me that these taxes are wholly indefensible, and, considering that they have already been abolished in the other Presidencies, that they are unequally assessed and fall upon the poorer classes. I have no hesitation in offering my humble recommendation to the Hon'ble Court of Directors to sanction their immediate abolition in the Presidency of Madras.

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## No. 33.

### TRIAL OF OFFENDERS BELONGING TO THE HYDERABAD CONTINGENT.

*(8th February, 1856.)*

I CONCUR with Mr. Grant in thinking that, if the prisoners be tried otherwise than by a military court, they will not be subject to capital punishment. But I do not find any authority for trying them before a military punchayat. My own opinion is that they are subject to the Articles of War for the native troops of the East India Company, Act No. XIX of 1847. That Act was passed under the 3 & 4 Will. 4, c. 85, section 73, which authorized the Governor General in Council to make Articles of War for the government of the native officers and soldiers in the military service of the Company, and which declared that such Articles of War should be made and taken notice of in the same manner as all other Laws and Regulations to be made by the Governor General in Council under the Act, and *should be of exclusive authority* over all the native officers and soldiers in the military service of the Company to whatever Presidency such officers and soldiers might belong, *or wheresoever they might be serving*. The second section of the Act, XIX of 1847, enacts that the Articles shall be the Articles of War for the government of the native officers and soldiers *in the military service of the Company*, and Article 157 enacts that all officers and soldiers, etc., are to be governed by those Articles and subject to be tried by courts-martial. There can be no doubt that the third cavalry were, at the time of the murderous attack upon Brigadier Mackenzie, in the military service and pay of the Company, though they were not originally under the Articles of War. The Articles of War for Queen's troops apply to every person who is commissioned *or in pay* as an officer or who is listed *or in pay* as a non-commissioned

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officer or soldier—18 Vict., c. 11, section 2. In like manner the Articles of War for the European troops of the East India Company extend not only to those who are enlisted under them, but to all who are listed *or in pay* as non-commissioned officers or soldiers. It is true that the Articles of War have not been read to the troops in the manner directed by Article 158. But the provisions of that Article appear to me to be merely directory, and I do not think that any omission to comply with that Article or with similar Articles contained in the Articles of War for the Queen's troops or for the European troops in the service of the East India Company would form any defence for an officer or soldier, otherwise subject to them, who might be brought to trial for an offence against them. If it could be supposed that the offenders were ignorant of the punishment to which they would be obnoxious for a mutinous and murderous attack upon their officer, it might be a ground for extending mercy to them afterwards; but I agree with Mr. Grant in thinking that every native soldier must know that he is liable to suffer death for attacking and wounding his officer with an intent to murder him.

2. For the above reasons, it appears to me that, if the prisoners are to be tried before any court other than the ordinary criminal courts (which has no power to pass a capital sentence for the crime imputed to them), they should be tried by court-martial under Act XIX of 1847, and not by punchayat; and I should be inclined to try them by court-martial, rather than before the Resident or before one of the criminal courts in the Assigned Districts.

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## No. 34.

### GOVERNMENT OF OUDE.*

*(21st February, 1856.)*

THE Minute of the Most Noble the Governor General, dated the 13th instant, contains so complete a record and explanation of all the proceedings which have been adopted by the Government of India in relation to Oude, that it is unnecessary for me to do more than to record the fact of my full concurrence in all the measures which have already been adopted, and in those which His Lordship recommends to be adopted.

2. In reference, however, to paragraph 15 of His Lordship's Minute, I wish to explain, as I fear I did not make my meaning sufficiently clear, that I did not intend by my Minute of the 22nd August last to advocate that the mere fulfilment of the Treaty of 1801 should be compelled by force of arms. I stated in effect that there could be no security for the future good gov-

* See, too, Minute No. 24, *ante*, p. 55.

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ernment of the country, if that government should continue to be conducted by the officers of the King, and that any proposal to that effect would be utterly futile, but that if the King would consent to vest the whole civil and military administration of his kingdom in the East India Company for ever, a sufficient guarantee for the future good government thereof would be attained—paragraphs 29, 30 and 31.

3. I expressed my opinion that nothing less than the second project proposed by His Lordship's Minute of the 18th June, 1855, would be sufficient: that project was that the King should be permitted to retain his royal title and position, but should be required to vest the whole civil and military administration of his kingdom in the government of the East India Company for ever. I humbly recommended to the Hon'ble Court of Directors the adoption of the measures proposed in the second project, and that if the Hon'ble Court should determine to propose the second project and the King should refuse to accept the terms offered, the East India Company should exercise that power which, I believed, was, in strictness, vested in them, in consequence of the violation of the 6th Article of the Treaty, and should remove the King and his heirs for ever from the throne—paragraphs 26, 32, 36 and 37.

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## No. 35.

### IRRIGATION PROJECTS.

*(31st March, 1856.)*

I CONCUR entirely in the course proposed by Lord Dalhousie to be adopted.

2. I cannot, however, agree with my Hon'ble Colleague Mr. Grant in thinking that whatever great systems of irrigation promise to repay their cost and to benefit the country ought to be constructed by the State with money to be borrowed for the purpose. It appears to me that the improvement of which the country is susceptible by means of works of irrigation and the indirect benefits to be derived therefrom, are so vast that every reasonable encouragement ought to be given to private Companies who may be willing to embark in them.

2. Colonel Cotton, in his book upon public works in India, p. 184, estimates the amount required for works of irrigation at from 100 to 150 millions sterling, and I think there can be but little doubt that, to whatever extent the Home authorities may think fit to authorize the prosecution of public works with borrowed capital, there will still be ample room for private enterprise. No proposal from any private Company should, in my opinion, be acceded to which would entail upon Government



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the necessity of continuing the present system of fixing the assessment upon irrigated lands. If the proposal of Dr. Buist, referred to in paragraph 3 of the letter from the Officiating Secretary to the Government of Bombay, dated the 1st November, 1855, be acceded to, and the increased revenue be granted to the Company for 99 years, no change in the mode of assessing lands in the district, to which the Company might extend its operations, could be made during that period.

3. I concur with Mr. Grant in thinking that the proper mode of charging for water supplied for purposes of irrigation is to charge a reasonable price for the quantity supplied, and not an increased assessment for the lands irrigated. The objection to charging so much for every acre watered, instead of so much for every cubic yard of water supplied, is clearly pointed out by Colonel Cotton in the work above referred to, p. 185.

4. If Public Companies shall be allowed to construct works of irrigation, I think that the nature of the proposed works and the extent of the district in which they should have liberty to construct them, should be approved by Government in each case, and the extent of the district should be regulated by the nature and estimate of the proposed works and the amount of capital proposed to be raised. If the land required for the works be given by the Government, and if they collect the water rates, they should have a share of the profits to be determined upon. The Company should also be bound to complete the works within a given time, allowing them an ample time for the purpose. The Company should be bound to construct such bridges as in the judgment of Government may be rendered necessary by the works. I see no reason why the Government should contribute to the cost of such bridges, but, if they are to do so, they should have an increased share of the profits. I should, however, prefer throwing the whole cost of bridges upon the Company as a necessary part of the works.

5. I doubt the necessity in cases of this sort of guaranteeing any fixed rate of interest upon the capital of the Company.

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## No. 36.

### Union of functions of Collectors and Magistrates.

*(15th May, 1856.)*

I have read the whole of the papers connected with this subject with that care and attention which the importance of it demands.

2. It appears to me that, in theory, the union of the offices of Collector and Magistrate is extremely objectionable, and,

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judging from the practical operation of it during the short period in which the system was in force in the Lower Provinces of Bengal, I think that it would not be wise to revert to it. From the year 1780 to 1787, the offices of Judge and Collector were held by different persons. But in the latter year it was resolved that the office of Judge should be held by the person who had charge of the revenue, and from that time until the year 1793, the several duties of Collector, Judge and Magistrate were discharged by the Collector. In 1793, the Marquis Cornwallis determined to vest the duties of collecting the revenue and of administering justice in separate officers. In his Minute upon that occasion, he made the following remarks:— "There is no class of men which Government should watch with greater jealousy and over whom the Regulations should have a stricter control, than the officers who are entrusted with the collection of the revenue. It is necessary to arm them with powers to enforce their demands in the first instance: otherwise individuals, under the pretext of disputing the justness of it, might protract the payment of what is due from them, and render the collection of the public revenue either impracticable or an endless source of trouble and litigation. But, to prevent the abuse of this power, there should be Courts of Justice ready to punish oppression and exaction, and the people must be satisfied that the remedy will be certain and effectual and that it can be expeditiously obtained." Accordingly by Regulation 2, 1793, the office of Collector was separated from that of Judge and Magistrate, and it was not until after the year 1821, *viz.*, about the year 1829, that the offices of Collector and Magistrate were again united under the provisions of Regulation 4 of 1821. Many of the reasons which were assigned in the preamble of Regulation 2 of 1793 for withdrawing from the Collectors their judicial powers, may be now urged with equal force against re-investing them with that portion of the judicial powers which are now vested in the Magistrate, and which have been greatly increased since that date. The following is an extract from the preamble of Regulation 2 of 1793:—

"Exclusive of the objections arising to these Courts from their irregular, summary, and often *ex-parte* proceedings, and from the Collectors being obliged to suspend the exercise of their judicial functions whenever they interfere with their financial duties, it is obvious that, if the Regulations for assessing and collecting the public revenue are infringed, the revenue officers must be the aggressors, and that individuals, who have been wronged by them in one capacity, can never hope to obtain redress from them in another." * * * * * *

* * The Collectors must not only be divested of the power of deciding upon their own acts, but must be rendered amenable for them to the Courts of Judicature and collect the public



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dues subject to a personal prosecution for every exaction exceeding the amount which they are authorized to demand on behalf of the public, and for every deviation from the Regulations prescribed for the collection of it."

3. The offices, having been separated in 1793, and re-united in 1821, continued to be held by the same officer until they were again separated in consequence of the report of the Police Committee presented in 1838. In that report, paragraph 8, the Committee say—"to the union of Magistrate and Collector injurious effects are generally attributed. The union which formerly existed between the offices of Judge and Magistrate was not so prejudicial because police was the primary object with the Judge and Magistrate: but it has been secondary with the Magistrate and Collector. Civil business, it has been observed, could wait, but the Government cannot wait for its revenue. In neither case is such a union desirable." In paragraph 12, they say—"the majority of the Committee, in concurrence with almost the whole of the gentlemen both in and out of the Service who have been asked their opinions, think decidedly that the efficiency of both departments would be much better secured, generally speaking, by entrusting the superintendence of each to a distinct functionary." Mr. Smith, in his Minute (Appendix C.), remarks—"Nothing can be worse than the union. It is wrong in theory and evil in practice." I need not say more on this subject, as I believe out of Calcutta the opinions of the service are unanimous. With this experience I think the re-union would be taking a step in the wrong direction. There is a considerable difference between the revenue systems of Madras and Bengal; but I think it may not be out of place to refer to the remarks of the Commissioners for the investigation of alleged cases of torture in Madras upon the subject of disuniting revenue and police functions. I concur with Mr. Grant in thinking that it would be objectionable to render the Judge of the District subordinate to the Commissioner of Revenue and Police, or to equalize the salaries of the Judge and of the Collector.

Paragraphs 79 to 86,

## No. 37.

### ENACTMENT EMPOWERING LEGISLATIVE COUNCIL TO DISALLOW BYE-LAWS.

*(30th July, 1856.)*

I UNDERSTAND that the Right Hon'ble the Governor General and some of my hon'ble colleagues entertain donbts as to the legality of the power, reserved to the Legislative Council by section 121 of Act 14 of 1896, of disallowing a bye-law by an order. I confess that I do not entertain such doubts, I think

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that the Legislative Council, when vesting the Municipal Commissioners with power to make bye-laws, were competent to annex, as a condition to the exercise of that power, a right in themselves to disallow by order any such bye-law of which they might disapprove. Although the Legislative Councillors are prohibited from sitting and voting in the Council of India except at meetings thereof for making laws and regulations, I do not think that the Legislative Council are incompetent to make an order, or to pass a resolution, or to do any thing except making a law or regulation. The condition being one arising out of, and connected with, a Legislative Act, I think it was properly reserved to be executed by the Legislative Council.

2. It is very unimportant in the present case whether any disallowance, if necessary, should be effected by an order or an Act and. deferring to the opinion of the Governor General and my hon'ble colleagues, I have prepared a Bill to repeal section 121 of the Act above referred to, and to make other provisions in lieu thereof. The Bill was read a second time last Saturday.

3. Since this question was discussed in Council, I find that a course very similar to that provided by section 121 had been adopted by Parliament. By the 3 & 4 Vict., c. 94, and the 4 & 5 Vict., c. 52, the Lord Chancellor, with the advice and consent of the Master of the Rolls or the Vice Chancellor, has power to make certain rules with reference to the mode of proceeding in the Court of Chancery; and it is provided by 4 & 5 Vict., c. 52, section 1, that, if either of the Houses of Parliament shall, within a certain time, resolve that the whole or any part of such rules ought not to continue in force in such case, the whole or such part of the rules as shall be included in the resolution, shall cease to be binding—thus authorizing the disallowance of the rules by a resolution of either House, instead of requiring the concurrence of both Houses and the Queen's assent to an Act of Parliament to disallow any rule made under the powers conferred upon the Lord Chancellor by the Statutes above referred to.

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## No. 38.

### ARRANGEMENTS DURING LEAVE OF ADMINISTRATOR-GENERAL.

*(7th August, 1856.)*

THE Administrator-General applies for two months' leave to commence from the 23rd instant, or such subsequent date from which he may avail himself of it. He suggests that he may be allowed to name his own substitute, subject to the approval of Government, and to arrange for his remuneration, and he proposes that Mr. Fagan may be allowed to act for him. The Administrator-General having been nearly three years in

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Government employ, I think the leave asked for may be properly granted, and, considering the peculiar nature of the duties of the office, and that the Administrator-General is paid by commission and not by salary, that he provides and pays his own establishment, and that he proposes that his substitute shall act upon his responsibility, I do not think that his request to be allowed to name his substitute and to arrange for his remuneration is unreasonable. I am not personally acquainted with Mr. Fagan. He is a Barrister, and officiated as Senior Magistrate of Police in Calcutta during the absence of Mr. Hume. I think the nomination may be sanctioned, if the Right Hon'ble the Governor General sees no objection to allowing the Administrator-General to nominate his own substitute. As the legal estate in the property to be administered is vested in the Administrator-General, I think it will be necessary that the substitute should have a power-of-attorney from the Administrator-General.

2. With a view to lessen the responsibility of the substitute, the Administrator-General proposes to sell, before his departure, all Company's paper, the proceeds of which is likely to be required during his absence, and not to include in the power-of-attorney an authority to the substitute to indorse Company's paper. The power and responsibility of the substitute will, no doubt, be much diminished by adopting this course. The Secretary considers it doubtful whether the *locum tenens* ought to be left with such limited powers, regard being had to the convenience of the public. I do not think it likely that the public would be much inconvenienced by the arrangement, for the Administrator-General must, I should think, be able to ascertain from his books what claims ought to be discharged within the next two months, especially as the office will be closed for the Doorga Poojah holidays for a fortnight of that period. But I concur with the Secretary that it will be better that the substitute should be invested with full powers to act for the Administrator-General, and to conduct every part of the business of the office during his absence. But, whether it be determined that the substitute should have a general or a limited power, I am of opinion that no Company's paper should be sold earlier, in consequence of the absence of the Administrator-General, than it would be sold if he remained in Calcutta; for, if the market price of Government securities should rise in the meantime, the estates would suffer in consequence of selling the paper sooner than necessary. If the power is to be limited, I would limit it to the sale and endorsement of the particular securities which the Administrator-General proposes to sell before his departure. This will occasion no greater risk than if the securities were sold at once and the proceeds placed in the Bank of Bengal at the disposal of the substitute. Upon the whole, my opinion is that the leave may be granted; that the Administrator-General may be allowed to

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nominate his substitute; that Mr. Fagan be approved to act for the Administrator-General during his absence; that such a power should be given by the Administrator-General as will enable Mr. Fagan to conduct all the duties of the office; and that Mr. Fagan may be allowed to act upon his own responsibility and that of the Administrator-General without being required to find any other surety. Considering the numerous checks provided by the rules under which the Administrator-General acts, I do not think that any risk will be incurred during the short period in question; but, if it be thought necessary, the Sub-treasurer might be required not to deliver out of the Treasury more than a limited amount, say, one lakh of Government securities, until further security is given by Mr. Fagan. But I am of opinion that the precaution is not necessary, and that it may lead to inconvenience.

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## No. 39.

### CONFISCATION OF PROPERTY OF MAHARANEE JUNDA KOUR IN CONNECTION WITH SIKH WAR.*

*(3rd November, 1856.)*

I CONCUR entirely with the Right Hon'ble the Governor General. The opinion which has been transmitted by the Hon'ble Court of Directors for the information and guidance of the Government of India is decisive as to the legal rights of the Government.

2. With the greatest deference, however, to the opinion of the Law Officers of the Crown and of the other gentlemen who joined in that opinion, I feel bound to state that, after a careful re-consideration of the case, my former opinion remains unchanged. If the Government could lawfully have confiscated the property as the property of an enemy during the war, which, I think, they had a right to do, it appears to me that the actual and undoubted possession of the property against the will of the owner, during the war so far vested the property in the Government, that no further act was necessary to be done, to enable them to confiscate that property either pending the war or after the termination of it, and that no Court of Justice could question their right after proof that the property was the property of an enemy and was in the possession and under the absolute dominion of Government without the consent of the owner during the war.

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* See, too, Minute No 1, *ante*, p. 1.

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## No. 40.

### EXCLUSION OF RELIGIOUS SUBJECTS FROM UNIVERSITY EXAMINATIONS.

*(1st December, 1856.)*

I ENTIRELY concur in all the proposals of the Right Hon'ble the Governor General. It appears to me, with the greatest deference to the Committee and to those who entertain a different opinion, that, in a University connected with Government, it would be better to exclude, in examinations for honours as well as in examinations for degrees, every subject connected with religious belief. I think that it should not be optional for any one to select, even for an examination for honours, any subject from which his competitors may be excluded by reason of their religion. In selecting the subjects for examination for honours so as to include, according to the directions of the Hon'ble Court, "the best portions of the different schemes of study pursued at the affiliated institutions," I would exclude every study connected with religion. I think it would be showing a preference, if the time occupied in studying one religion may be made available for honours, when the time occupied in studying another religion at a different affiliated institution cannot be made available in like manner. There is so wide a distinction between a Government University in this country and the London University, that the analogy between the proposed optional examination in the evidences of revealed religion and the examination in the Old and New Testaments and Scripture history in the London University does not appear to me to hold good.

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## No. 41.

### GOVERNMENT OF TANJORE.*

*(8th December, 1856.)*

THE Treaty of November, 1799, was intended to vest in the Government of the East India Company the entire and exclusive administration of Tanjore, both civil and military, and to secure an ample provision for the Rajah. My opinion is that the sovereignty was not extinguished by that treaty, and that it continued until the State lapsed to the British Government. I concur with Mr. Grant in thinking that it is unnecessary for the purpose of this litigation to enter into the question whether the treaty operated to extinguish the sov-

* See, too, Minute No. 42, *post*, p. 90.

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ereignty of the Rajah or not, and I think it would be impolitic to raise that question for the decision of a Court of law, or to admit the right of the Court to construe or determine the effect of a State Treaty. I entirely agree that any property purchased by the Rajah out of the funds allotted to him should be treated as private property, and relinquished to the person entitled to succeed to it as private property, whether it consists of moveable or immoveable property. I think that both policy and justice alike demand that such property should not be treated as State property. I would insist upon the right of Government to the Fort and lands which belonged to the Raj at the time of the Treaty of 1799. As to jewels or other personal property which can be clearly established to have belonged to the Raj in 1799, I concur with the Governor General in thinking that the right should be enforced, but I would not prefer a claim to any personal property which cannot clearly be proved to have been State property in 1799. I doubt the expediency of going into the whole history of the case in the answer as recommended in the early part of the Advocate-General's opinion of the 5th December, as it appears to raise the question for the Court whether the East India Company had the right to the absolute sovereignty and dominion of the State upon the death of the late Rajah. I should rather rely upon the fact that the British Government, upon the death of the late Rajah, took upon itself the absolute and entire dominion and sovereignty of the State as one which had lapsed to the British Government. That the property claimed was State property and taken possession of by the British Government as State property, disclaiming all intention to take private property and abandoning its title to that which it admits to be private property.

2. The answer as proposed to be drawn by Mr. Ritchie appears to me with all due deference to offer to the Court the means of determining questions with which the Court has no right to enter, submitting only that the Court ought not to determine them. I would rather stand upon the right of the Government to determine such questions for itself, and would not submit any facts which will enable a Court of Justice to determine whether the Government was right or wrong in assuming the sovereignty of a particular State.

3. These papers came to me only this morning, and must, I understand, go off by the mail this evening. I have therefore given the case the best consideration in my power, though I have not been able to study it so minutely as I could wish, nor have I seen the Bill which has been filed. Time should, I think, be obtained, if necessary, for answering the Bill, so that the answer may be prepared with that care which the importance of the principle involved requires.

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## No. 42.

### GOVERNMENT OF TANJORE.*

*(18th December, 1856.)*

I CONCUR entirely in the view taken by the Right Hon'ble the Governor General that the sovereignty of Tanjore continued in the Rajahs until the extinction of the line upon the death of Sevajee.

2. I have now had an opportunity of reading the Bill, from which it appears that the plaintiff's claim is limited to the private and particular estate of the late Rajah. The Bill raises no question as to the extinction of the sovereignty or the right of annexation.

3. The plaintiff founds her title upon the allegation contained in paragraph 11 "that upon the death of Sevajee, she, as his eldest widow according to Hindu law, became and is entitled to inherit and possess his private and particular estate, real and personal, and to administer the same in due course of administration."

4. The Bill then alleges (paragraph 13) that under pretence of taking the State or throne property of the Raj, the defendants have possessed themselves of the private and particular estate and effects of the late Rajah.

5. There is no difference of opinion as to the course which ought to be pursued with respect to the property purchased since 1799 out of the Rajah's stipend.

6. Whatever the law may be on the subject, it is agreed that such property ought not to be claimed as State property.

7. Such being the case, I concur with the Right Hon'ble the Governor General that, in answering the Bill, it may be said that without conceding any of the rights which the Government may possess under the treaties to other property, and denying the jurisdiction of the Court, the Government of India is willing to give up to the representative of the late Rajah all property that can be deemed private within the meaning which it attaches to that term.

8. I should be inclined, however, to except property which is in its nature State property, such as munitions of war, including the gunpowder and bullets which were destroyed [case, p. 9].

9. I think it would be advisable, if it can be done, to annex two schedules to the Bill, one containing an inventory of the property claimed by the defendants as State property, the other an inventory of that which the Government are willing to relinquish. With regard to the latter, I would state that without admitting that there is any distinction

* See, too, preceding Minute No. 41, *ante*, p. 88.

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in law between the public and private property of an absolute Sovereign or the jurisdiction of the Court to order an account of the private and particular estate of the late Rajah to be taken, the defendants do not claim, and never intended to claim, any property in the nature of private property in the possession of the late Rajah (*see* case, p. 6) that their claim is confined to property which was the public property of the Raj at the time of the Treaty of 1799, and to such other property alone which is, in its very nature, public, such as munitions of war.

10. With regard to the property claimed as public or State property, I doubt whether it is necessary to go so fully into the case as is done in the proposed answer. As the Bill is framed, it is not necessary for the Government to make out its title to the public or State property, for the Bill does not dispute the right of the defendants to the State property. The simple question will be, is the property claimed State property, or the private and particular property of the late Rajah?

11. Paragraph 10 of the proposed answer may tend to invite discussion as to the point therein alleged, *viz.*, that upon the death of Sevajee, the Raj of Tanjore became extinct *in consequence* of the political relations which had subsisted between the British Government and the Rajahs of Tanjore *under the treaties set forth*, and that, according to the effect of the said treaties, the sovereignty of Tanjore and the right to all the State property thereof lapsed to the defendants, etc.

12. I am not sure that such was the effect of the treaties. I am rather disposed to think that the State lapsed to the British Government as the paramount power upon the extinction of the line of Rajahs independently of the treaties referred to. I would submit to the Advocate General whether paragraph 10 might not be modified, and whether it would not be sufficient to allege that, as an act of State, it was determined that the dignity of Rajah was extinct and that it was determined, as an act of Government, that the State had thereupon lapsed, and that the whole dominion and sovereignty of the State, together with the property belonging thereto, should be assumed, and that they should become part of the British territories and remain in trust for the Crown.

13. Paragraph 15 of the answer will, I presume, be now omitted except as to the munitions of war.

14. I should be inclined to omit the words "in the nature of" in paragraph 18, line 15, and assert that the property was State property, and that, with the exception of the munitions of war, the defendant succeeded to them in his character of Rajah and not otherwise.

15. I should also be inclined to deny the jurisdiction of the Court in respect of the Fort and other real property situate in Tanjore, and to allege that the defendants are ready to deliver

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the property not claimed by them to the person or persons entitled thereto or to dispose of it in such manner as the Court may direct, without admitting that the plaintiff, as the eldest widow, was, according to Hindu law, entitled to inherit or administer it even if it were in law the private and particular estate of the late Rajah.

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## No. 43.

### CENSURE OF JUDICIAL DECISIONS.

*(23rd February, 1857.)*

I HAVE read with great care all the papers in this case, and I think it is greatly to be regretted that the Lieutenant-Governor should have considered it necessary to order the removal of Mr. Kemp and to censure him openly for his decision. I cannot discover anything, either in the facts or in the observations of the Lieutenant-Governor, to show that there was any ground for censure. The utmost that appears against Mr. Kemp is that he overruled the decision of the Magistrate, and that three of the Judges of the Sudder Court have declared their opinion that the orders of the Magistrate should have been confirmed, and that Mr. Kemp was *wrong* in acquitting the prisoners. I do not understand that, by the use of the word "wrong," the Judges intended to express their opinion that Mr. Kemp was culpable. I think they merely intended to report that Mr. Kemp had acquitted the prisoners upon evidence upon which the three Judges would have found them guilty. The case was not referred to the Judges by His Honour the Lieutenant-Governor for the purpose of obtaining their advice as to whether Mr. Kemp had acted hastily or carelessly or without proper consideration. The Judges were not asked whether in their opinion Mr. Kemp had discharged his duties in such a manner as to render him justly open to censure, but simply whether, on the evidence adduced, Mr. Kemp was right or wrong in acquitting the prisoners. Now as even the best and most careful Judge is liable to error in forming an opinion upon a question of fact depending upon conflicting and discrepant evidence, I think there is a very material distinction between asking the Sudder Court whether, in their opinion, a particular decision is right or wrong, and asking them whether a Judge has conducted himself in a particular case, or generally in such a manner as to render himself justly liable to censure or to show that he is unfit to be trusted with the important duties of a Judge. A reference of the latter description in effect puts the Judge upon his trial, and he ought, therefore, to be allowed to defend himself; and I can scarcely imagine a case in which such a reference ought to be made by the Executive Govern-

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ment, unless where the Government is satisfied that a *primâ facie* case is made out against the Judge, not merely of error in judgment, but of misconduct. It appears to me that His Honour has not sufficiently adverted to the important distinction between a mere error in judgment and misconduct. It is clear that His Honour did not refer the case to the Sudder Court because he considered that a *primâ facie* case of misconduct had been established against Mr. Kemp.* Yet upon the report of the three Judges that, in their opinion, the orders of the Magistrate should have been confirmed and that Mr. Kemp was wrong in acquitting the prisoners, Mr. Kemp, without any opportunity of explanation or defence, is informed, in a public letter from the Junior Secretary to the Government of Bengal (a copy of which was forwarded to the Sudder Court), that the result of the reference to the Sudder Court might have led to the removal from the Judicial Bench of the service of an officer of less established character; that it would not be conducive to the interests of Government that he should remain in his present position at Backergunge; that he would, therefore, be removed to another zillah at an early date; and that he could not expect that his convenience would be consulted in the arrangement that might be made. And he is cautioned to be more careful in future in his proceedings, and to endeavour to avoid falling into any errors of judgment, which, it was remarked, "could in his case arise only from haste and inconsiderateness." Such a censure openly passed upon a public servant of high standing, and of acknowledged good character as a Judge for a mere error of judgment in deciding upon the facts of a particular case must necessarily tend to destroy the independence of the Hon'ble Company's Judges and their fearlessness in the discharge of their public duties.

*See paragraph 8 of the Minute of the Lieutenant-Governor, in which he remarks—"I am free to confess that, looking to the manner in which the case was represented by the persons aggrieved and to the good character of Mr. Kemp as a Judge, I had an entire expectation that the verdict of the Sudder Court would be in his favour, and I conceived that, by a concurrent opinion of the highest Court of Appeal, Mr. Kemp's judgment and just influence would be strengthened in the important position he occupied."

2. It is not easy to discover what, in the mind of the Lieutenant-Governor, is the precise offence for which such censure was passed. His Honour speaks of the "verdict" of the Sudder Court (as though Mr. Kemp had been put upon his trial) and of "the condemnation which the Sudder Court had passed upon his judgment." He treats Mr. Kemp as a Judge "upon whom the Government cannot rely with entire confidence for sound judgment and a full reputation for impartiality," and the caution addressed to Mr. Kemp by the letter, which conveyed the censure, implies that Mr. Kemp was guilty of haste or inconsiderateness; for he is told that errors of judgment can in

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his case arise only from haste or inconsiderateness — a conclusion, which, if drawn from the previous high character of Mr. Kemp, would render the best Judge that ever adorned the Bench the most obnoxious to censure for an error of judgment in an individual case.

3. In other parts of his Minute, His Honour observes that he cannot pretend to decide upon a difference of opinion between a Zillah Judge and a Full Bench of the highest Court of Appeal, and he states that, with three Judges against him, as well as the Magistrate, he cannot doubt that his judgment has been justly condemned. The majority of opinion against that of Mr. Kemp may form a very good ground for presuming that Mr. Kemp's opinion was wrong, and that the others were right; but surely it cannot afford a sufficient reason for the censure passed upon him, unless it be admitted that every Judge is liable to censure for overruling the decision of a lower Court, if his own decision should happen to be reversed upon appeal by a Full Bench of the Sudder Court. Such a principle would justify the passing of censure upon a Sudder Judge who might happen to give judgment in favour of reversing the decision of a Zillah Judge, if the majority of the Judges composing a Full Bench of the Sudder Court should express a contrary opinion. In such a case the judgment of the lower Court would be affirmed, there would be three opinions against one, but no one, I hope, would think of censuring the Judge who from conscientiously expressing his opinion would be in a minority.

4. In another part of his Minute, His Honour, after stating that he had an entire expectation that the verdict of the Sudder Court would be in Mr. Kemp's favour, and that, if such had been the result of his reference to the Sudder Court, he should have upheld Mr. Kemp against any amount of clamour, proceeds— "I was surprised and grieved to find that the unanimous opinion of three Judges of the Sudder Court was altogether the reverse of what I had anticipated. But, sorry as I was, I was unable to avoid acting towards Mr. Kemp on the unexpected condemnation of his judgment on the same principle as I should have acted if his judgment had been approved. As I should strenuously and openly have supported him in the one case, *so I felt constrained to censure him openly in the other.*" It is unnecessary to point out the unsoundness of that argument. It dees not follow that, because it would have been right to support Mr. Kemp openly and strenuously against any amount of clamour if his judgment had been affirmed by the Sudder Judges, it was necessary to censure him, because those Judges reported that they entertained a different opinion. I have not had an opportunity of comparing Mr. Kemp's judgment with the evidence in the case, because no translation of the record has been sent up. But I do not find that the Lieutenant-Governor had founded his censure upon anything beyond the bare

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expression of the opinion of the three Judges. All that I can find against Mr Kemp is, that he differed in opinion from the Magistrate and three of the Sudder Judges upon a question of fact in a case depending upon conflicting evidence. I have not the means of forming an opinion as to whether Mr. Kemp was right or wrong. He may have been right, though being in a minority of one to four, he may be presumed to have formed an erroneous opinion; but this is no sufficient ground for passing censure upon him, nor do I think that it affords a *primâ facie* case for referring his conduct to the Sudder Court for a special report or for putting him upon his defence. If, therefore, no censure had been passed upon Mr. Kemp in consequence of the opinion expressed by the Sudder Judges, I should not have considered it necessary to ask the Sudder Judges for any explanation of their answer: but, as the Lieutenant-Governor relies upon the report of the Sudder Judges in support of the censure which he has passed, I think it right that His Honour should be requested to call upon the Judges for an explanation of their answer, and that the course proposed by the Right Hon'ble the Governor General should be adopted.

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## No. 44.

### LIMITATION OF NUMBER OF OFFICERS ABSENT FROM REGIMENTS.

*(24th February, 1857.)*

I AM strongly in favour of laying down such a minimum rule as will provide effectually for the discipline of the Army. That is the primary object which, in my opinion, ought steadily to be kept in view, and which cannot be so well attained as by laying down a well considered rule requiring the presence of a certain number of qualified officers with eve ; regiment. I express my opinion upon such a subject as this with great distrust; but it appears to me that there ought to be present with every regiment of infantry or cavalry one officer at least for each company or troop in the regiment eligible for the command thereof. I think it will be better not to fix a minimum rule at all than to fix it too low. But it appears to me that a rule might be laid down, by which one officer for each troop or company of infantry of those who are eligible for the command thereof should always be present with each regiment, especially if the old rule, which was abolished only as a temporary measure, of including Field Officers amongst the number of absentees allowed, be again acted upon.

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## No. 45.

### EMIGRATION TO BRITISH GUIANA UNDER PRIVATE CONTRACTS.

*(26th March, 1857.)*

THE grounds urged by the Bombay Government do not apply solely to a system of emigration to be carried on by private enterprise; but they extend equally to emigration to be carried on by the Government of British Guiana, which is now authorized by law.

2. I see no objection to the course proposed by the Emigration Commissioners, provided the substantial provisions of Act XXI of 1844, as amended by Act IV of 1852, be allowed to remain in force, with the exception of transferring to the Protector of Emigrants some of the duties now required to be performed by the Emigration Agent and of dispensing with the necessity of an engagement by Government.

3. I am not quite sure whether the Commissioners, in proposing that the duties of the Emigration Agent are not to extend to any part of the shipping arrangements, intend to transfer to the Protector the duties now imposed upon the Emigration Agent by Act No. XXI of 1844, section 7, clause 2: but I understand that those duties are now to devolve upon the Protector. The main alteration, as I understand the proposal, is to get rid of the necessity of an engagement on the part of Government with the emigrants, and to allow them to be engaged by the Emigration Agent on the part of private individuals.

4. I understand that (1) the contracts to be entered into with the emigrants are to be in a form to be approved by the Government of India; (2) that they are to be for service on the estates or plantations of the importers; and (3) that the emigrants are not to be bound to work on estates which, from climate or other circumstances, may be considered by the Local Government as unfit for the reception of emigrants. In other respects I presume the contract will be similar to that contained in the British Guiana Ordinance, 7 of 1854, Schedule B.

5. I attach much importance to these provisions. The second, I think, is necessary, for I do not think that the importers should have the power of allotting the emigrants to others or of letting out their services, a system which, I think, would be liable to great abuse. The third is also important, inasmuch as under the proposed system the emigrants will have no such choice as to location, as they have at present, after their arrival in the Colony and, without some such clause in the agreement, they might be sent to estates unfit for their reception either on account of climate or for some other cause. The contract should also contain a clause to the effect that the master will provide comfortable accommodation and a suitable hospital and medical attendance in case of sickness.

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6. Previously to the proposed system being sanctioned, the British Guiana Ordinance must be amended so as to provide the same protection to emigrants who may enter into contracts here, as is provided by the Ordinance for *indentured immigrants*, by which words, I understand emigrants indentured or located under section 20 of the Ordinance are intended. Such, for instance, are the provisions against ill usage; failure to provide employment upon which, according to the terms of the contract, the wages depend; the granting of certificates of industrial residence; and the provision of hospital accommodation, medicines, etc. If any Act be passed here to authorize emigration upon the terms proposed, which should not be done before the views of the Hon'ble Court shall have been communicated, I think it should not come into effect until the Governor General in Council is satisfied that proper provision has been made in the Colony for the protection of such coolies as may emigrate under contracts with private individuals, one of which should be that a back-passage shall be provided by the Government for any immigrant who may have emigrated under a private contract, and who may become permanently unfit for labour by accident or sickness. This provision should expressly be made applicable to all immigrants under the new system. The Government should, I think, be bound in such case, and also after the completion of the term of industrial residence, to provide a return-passage or to see that it is provided, and should look to the importer for repayment under his bond, if necessary. If these things be properly attended to, I do not apprehend that the emigrants are likely to be less protected under the proposed system than under that at present in force at Calcutta and Madras.

7. The duties of Emigration Agent and Protector of Emigrants should not be entrusted to the same person.

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## No. 46.

### Appointments to Brigade Staff.*

*(5th April, 1857.)*

If seniority conferred a right to be nominated to the Brigade Staff unless good cause for not nominating the senior could be shown, I think it would be proper, where a senior officer is passed over, for the Government of India to ascertain precisely the reasons for superseding him in order to judge whether the reasons are sufficient or not. But, as I understand the principle laid down for the nomination of officers for Divisional and Brigade Commands, it is that they are to be selected with re-

* See, too, Minute No. 47, *post*, p. 99.



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ference to their qualifications for the duties. The old principle of nominating the senior officer unless notoriously incapable has been abrogated; and I apprehend it now rests with the Commander-in-Chief, who is admitted * to have the right of nomination (including that of selection), to nominate the officer who, in his judgment, is best qualified to discharge the duties of the appointment. The right of selecting and nominating is in the Commander-in-Chief. The right of rejecting or appointing the nominee of the Commander-in-Chief is in the Governor General in Council. The Governor General in Council, before he appoints the nominee of the Commander-in-Chief, is bound to ascertain, as far as he can, that the officer selected is fully qualified to discharge the duties to be entrusted to him. Perhaps I might go further and say "the best qualified;" but I humbly submit that it is not the duty of the Governor General in Council to watch over the interests of senior officers who may have been passed over. No doubt seniority in the service, if not accompanied by too great a seniority in years, will always have its due and just weight with the Commander-in-Chief in making his selection; but I think it would be inexpedient and tend to give seniority more than its just and proper weight, to require the Commander-in-Chief to explain his reasons in full for passing over a senior officer in any case in which the nominee is fully qualified. If the Government could point out to His Excellency that any of the officers senior to the nominee are better qualified for the appointment, it would be right to call attention to the fact; but this is not the case. I will assume for the sake of argument, though I do not think it likely to be the case, that the Commander-in-Chief, being asked to state his grounds for passing over the three senior Colonels, should point out reasons which would not have induced the Government of India to pass them over if the right of nomination had not belonged to His Excellency. If he should satisfy the Governor General in Council, that his nominee is better qualified than either of his seniors that, I apprehend, upon the principle laid down, would be a sufficient reason. But suppose he should only be able to satisfy the Government that all four are equally good, but should state, not merely that he considers the junior—as he has already stated—to be better qualified than his seniors, but that he cannot feel himself justified in proposing either of the three senior Colonels, and should give a detailed account of reasons which have induced him to come to that conclusion but which should not be sufficient to produce the same conviction upon the mind of the Governor General in Council. It will be impossible for the

* Does this depend upon usage, or is it anywhere directed by the Hon'ble Court of Directors that the Commander-in-Chief is to *select* and to *nominate*? Has any rule upon the subject ever been laid down under 3 & 4 Will. 4, c. 5, s. 78?

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Governor General in Council, though he may not agree with the Commander-in-Chief, to order His Excellency to nominate an officer whom, whether right or wrong in his opinion, His Excellency has declared that he cannot conscientiously nominate for the appointment. The Government of India, though disagreeing with the Commander-in-Chief, must either allow the three seniors to be passed over, or, apart from the principle that seniority has such a just claim, *cæteris paribus*, that the senior ought to be appointed, and they must pass by the nomination of the Commander-in-Chief and appoint the senior officer, though only qualified equally with his Excellency's nominee. Thus His Excellency would virtually be deprived of his right of selection and nomination. For the above reasons, it appears to me, that the Commander-in-Chief has already given a sufficient reason, if any reason be necessary, for passing over the three senior Colonels, *viz.*, that His Excellency, who has the nomination, does not feel himself justified in proposing either of them for the Brigade Staff. If the Governor General in Council should in any case disapprove of the selection made by the Commander-in-Chief, I presume that the proper course would be to state the grounds for not appointing his nominee, and to request him to make another nomination. The Government would not direct the Commander-in-Chief to nominate a particular individual, whether the senior officer or not, and would not appoint without a fresh nomination. Unless seniority gives a claim as of right, I do not think that any Colonel though senior to the nominee can have a *locus standi* if he should come before the Governor General in Council or the Hon'ble Court of Directors as an appellant, merely upon the ground that his seniority ought to have been taken into consideration.

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## No. 47.

### APPOINTMENTS TO BRIGADE STAFF.*

*(9th April, 1857.)*

SINCE writing my former Minute upon this subject I find, in answer to information with which I requested to be furnished, that the appointment of officers to command divisions is taken from the Hon'ble Court's Despatch, dated the 8th January, 1796, which is as follows:—"General officers for the staff are to be *selected by your Government* at the recommendation of the Commander-in-Chief." As regards the promotion of regimental Colonels to Brigade Commands and of Brigadiers to Divisional Commands, the Hon'ble Court, in their Military Des-

* See, too, preceding Minute No. 46, *ante*, p. 97.



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patch No. 15, dated the 26th January, 1853, approved of the sentiments expressed by the Governor General in certain paragraphs of His Lordship's Minute of the 21st June, 1851. In that Minute, His Lordship records his opinion "*that, while the claims of seniority should always have their due weight*, they should be less attended to than they have heretofore been, and that, in the appointment of officers to Divisional and Brigade Commands, the governing principle should not be, as hitherto, the rejection of no man unless he is notoriously unfit, but rather the selection of no man, however high his standing, who is not confessedly capable and efficient." His Lordship then adds –"I feel confident that His Excellency the Commander-in-Chief will concur with me in the views I have now communicated to him, views which in their principles have already received the sanction of the Hon'ble Court of Directors. His Excellency, if he should act upon them, may rely on receiving my cordial support on every occasion *on which he shall adduce substantial reasons for recommending the invidious measure of passing over a senior officer by reason of his being, in the opinion of His Excellency, not competent to the active and vigorous and thoroughly efficient exercise of Divisional or Brigade Commands.*" From the above extracts it appears to me to be clear that, although the Commander-in-Chief nominates, it is only by way of recommendation to the Supreme Government, and that, on every occasion on which he recommends a junior officer, he should adduce his reasons for passing over the seniors in order that the Supreme Government, in whom the right of appointing rests, may be able to judge whether such reasons are sufficient to justify them in acting upon His Excellency's recommendation. I therefore concur in thinking that His Excellency should be moved to state, for the information of the Governor General in Council, the reasons upon which he recommends that neither Colonels Jones, Wheler nor Haldane should be selected.

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## No. 48.

### GUARANTEES FOR RAILWAY CONSTRUCTION, (EASTERN BENGAL RAILWAY.)

*(25th April, 1857.)*

I HAVE no doubt as to the fact that the proposed line of railway has been carefully selected, and that the undertaking will be remunerative and of great commercial benefit. I do not apprehend that there would be any serious risk in guaranteeing 4½ or 5 per cent. interest. It appears to me, however,

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that it is not expedient to guarantee new lines of railway, at any rate until the present guaranteed trunk lines are much nearer to a state of completion. Railways having now had a fair start in India, capitalists should, I think, be left to look after their own interests in railways as well as in other matters in which they may embark, and a guarantee should be considered as an exception rather than as a general rule. I see no sufficient ground for treating the present as an exceptional case. I would give support and encouragement to every company ready to carry out any well considered railway scheme and having sufficient capital for the purpose, and I would take all such measures as may be necessary to enable the company to obtain at their own expense and under the control of Government, the lands necessary for the undertaking, annexing, either by a legislative enactment or by contract, such conditions as may be necessary for the protection of the public: but I would leave the projectors to carry out the works at their own risk and under the control of their own officials. If, after the present guaranteed lines are complete, further guarantees should be found necessary to induce capitalists to embark on new undertakings of this nature, the case will be different, but I trust that this will not be the case, and that the present guaranteed lines will prove that railways in India may be made the means of profitably investing capital. At present my opinion is adverse to any further guarantee except in a case which, from political or other causes, may be treated as exceptional.

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## No. 49.

### POLICE AND CRIMINAL JURISDICTION.

*(30th April, 1857.)*

I CONCUR entirely with the Right Hon'ble the Governor General as to the first proposal made by His Lordship, *viz.*, that the Police of Bengal be reorganized at once without waiting for a plan applicable to the whole of India; also as to the third proposal relative to the organization of police. I do not think that any great benefit is likely to arise from increasing the pay of the present Mohurrirs from an average of less than 8 rupees a month to an average of upwards of 33 rupees a month. I believe that, as a class, they are wholly unfit for the duties entrusted to them, and that no increase of salary will ever qualify them for the discharge of those duties I think that they should be altogether superseded by a new class of officers, to be, styled Naib Darogahs, at the rates of salary proposed by the Lieutenant-Governor for the Mohurrirs. The Naib Darogahs

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should be chosen from young men of education, who, if the offices of Darogah and of Deputy Magistrate be open to them, will probably be induced to accept employment as Naib Darogahs, in which they may be trained for the higher offices above mentioned. This seems to be, at least, one great object of the proposed increase of expenditure. If any of the present Mohurrirs are qualified for the duties, they may be selected for the employment of Naib Darogahs.

2. I concur in thinking that the salaries of the Jemadars and Barkandazes should be increased as proposed: but I think no police officer under the rank of a Naib Darogah should be allowed to exercise the powers of a Darogah or to hold investigations, except in a case of emergency in which they may be specially appointed for the duty. At present a Jemadar is considered as the third officer at a thannah, and, in the absence of the Darogah and Mohurrir, is authorized by law without any special appointment to exercise all the powers vested in a Darogah—*see* Regulation XX of 1817, section 4, clause 3. His Honour the Lieutenant-Governor considers that the Darogahs and Mohurrirs are amply sufficient for all investigations of a serious character and that, as regards cases of secondary importance, Jemadars selected from Barkandazes and receiving from ten to twenty rupees per month may safely be trusted to conduct the necessary enquiries. If the Deputy Magistrates proposed be appointed, I hope that it may be found unnecessary to authorize the Jemadars to act as Darogahs or to make investigations in any case, for I believe that great corruption and oppression are the consequences of the powers now vested in the lower classes of the police.

3. I doubt whether any salary less than five rupees a month will be sufficient for the Barkandazes. His Honour the Lieutenant-Governor proposes—

| | | | | | |
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| One-fourth | at | Rs. | 6 | a | month; |
| „ | „ | „ | 5 | „ | month; and |
| One-half | „ | „ | 4 | „ | month. |

I think that they, or at least such of them as are intended to act as preventive policemen, should be selected from those who can be relied on for courage and energy when opposed to such classes as the lathials. I agree with the Lieutenant-Governor in thinking that the Barkandazes should have promotion to look forward to as a reward for good conduct, and that they should be eligible for employment as Jemadars.

4. If the proposed number of Deputy Magistrates be sanctioned, there will be 200, which, after deducting from the whole number of thannahs those in the Sonthal districts and in certain large cities, will give nearly one Deputy Magistrate to every two

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thannahs, or at least one to every two of the most important thannahs. It appears to me, however, that the Deputy Magistrates (or I would rather call them Deputy Superintendents of Police) should not exercise any judicial powers as proposed by the Governor General. I think it should be their duty to superintend the police within their districts and the investigation of all cases of crime committed therein, and, with the assistance of the Darogahs and Naib Darogahs, to collect evidence, to take the depositions of witnesses and to bind them over to give evidence; also to see that every case of crime committed within their districts is taken before the proper Court for trial with the necessary witnesses and evidence to establish the charge. They should communicate with the Deputy Magistrates of the adjoining districts with a view to the apprehension of criminals, and with the Superintendent of Police of the Zillah in which their own districts are situate; and the Darogahs and Naib Darogahs should be bound to communicate to them every case of heinous crime committed within their respective thannahs, and should report to them whenever they have occasion to leave the thannah for the purpose of making investigations. These and other duties connected with the prevention and detection of crime will require them to be constantly moving about their districts. The Lieutenant-Governor remarks—"I think that the proper size of a Deputy Magistrate's jurisdiction was not unreasonably stated by an intelligent and experienced native friend whom I consulted on the subject, as so much as the Magistrate could go to one end of in his morning ride and the other end in his evening ride. This would probably comprise two or at most three thannahs." This is evidently impossible when it is considered that the size of a thannah, according to Regulation XXII of 1793 section 4, is ten coss square, which, if the district of a Deputy Magistrate comprised only two thannahs, would involve the necessity of a morning ride of 40 miles from his head-quarters to one end of his jurisdiction and back, and another ride of the same extent in the evening. But it is clear that he should be constantly moving about his district. If his own head-quarters and the two thannah stations subject to his jurisdiction were most favourably situate, he could not even visit each Darogah's station every alternate day without travelling at least 20 miles a day. To exercise judicial duties, a Deputy Magistrate ought to be stationary, or at least he should have fixed times for holding his Court at particular places: otherwise, when a prisoner is sent up to him for trial, together with the witnesses from a considerable distance, it may be found that, in the discharge of his police duties, he is at quite a different part of his station. Independently, therefore, of the objection so powerfully urged by our hon'ble colleague, Mr. Grant, against the union of Judicial and Police functions, I think it is impossible for the same officer to exercise any

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active superintendence over the police of his district, if he be expected to exercise judicial powers.

5. I therefore think that it will be better to leave all judicial powers to be exercised by the Sessions Court, the Magistrate and the Subordinate Criminal Courts, as proposed by the Law Commissioners. The Deputy Magistrates, however, should be authorized to take the depositions of witnesses, and to submit their proceedings to the Magistrate in all cases beyond the competency of the Subordinate Criminal Courts, and in such cases, the Magistrate should be authorized to order the offender to be sent up for trial before himself, or, if the case be beyond his competency, to commit it for trial before the Sessions. This would greatly relieve witnesses in cases triable only by the Magistrate and Sessions Courts, an object which it is most desirable to attain.

6. I have already written a Minute upon the subject of the union of the offices of Collector and Magistrate.* I still retain the opinion, which I then expressed, that the two offices should not be re-united if the Magistrate is to continue to have any superintendence over the police of the district. If the Magistrate be relieved from all police duties, I do not think that the union of the offices of Collector and Magistrate will be so objectionable. I feel very great doubt, however, whether the Collector will have time properly to attend to the judicial duties of Magistrate if the new sale law be passed. But, whether the offices of Collector and Magistrate be held by the same person or not, it appears to me that the management and superintendence of the police in each zillah should be entrusted to a European officer, who should have no judicial or other duties, and should be required to be frequently moving about in his district.

7. This leads me to consider the proposal of the Governor General that the police be superintended *as at present* by the Commissioners of Divisions acting under the general control of Government. I think it is very important that the police, in addition to the European Superintendent in each zillah, should be subject to Commissioners of Divisions; but, as far as the police are concerned, I think it would be better that the divisions should be larger than those now entrusted to the Commissioners of Revenue. One Superintendent of Police for the whole of the Lower Provinces has been found insufficient, but I think that two Commissioners of Police, or three at most, would be fully able to discharge all the duties belonging to the office. I doubt very much whether it is necessary to continue the Commissioners of Revenue in the Lower Provinces of Bengal, with the exception of the Commissioner of Cuttack. Those Commissioners were appointed under Regulation I of 1829, the preamble to which points out the defects which it was

* See Minute No. 36, *ante*, p. 82.

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intended to correct. Since that time many of the duties which those Commissioners were intended to discharge have been transferred to other functionaries; * the North-Western Provinces have been placed under a separate Lieutenant-Governor, a Sudder Board of Revenue of those Provinces has been appointed, and the duties of the Commissioners of Revenue in respect of the determination of questions relative to the assessment of lands, so far as the permanently settled districts are concerned, are absolutely nothing. I think it is, therefore, well worth consideration whether, of the eight Commissioners of Revenue in the Lower Provinces, seven might not be abolished, leaving the Commissioner of Cuttack alone, and substituting two or three Divisional Commissioners of Police. If this can be done, there will be a saving of four Commissioners at Rs. 36,000 a year each, and of their establishments, amounting, I believe, on an average to Rs. 910 a month, or Rs. 10,920 a year for each Commissioner; and possibly for the two or three Commissioners of Police a less salary than Rs. 36,000 a year and a less expensive establishment might be considered sufficient. This saving would go a great way towards paying the Zillah Superintendents of Police at the same rate of salary as is now paid to the Magistrates.

* Such as the principal duty of holding Sessions of Jail delivery which has been transferred to the Sessions Judge.

See third part of the recital of Regulation I of 1829.

8. I concur in thinking that the Munsifs should be vested generally with criminal powers, and I am inclined to think that they may be trusted with the powers proposed by the Law Commissioners to be vested in the Subordinate Criminal Courts of the Second Class, *viz.*, imprisonment for a term not exceeding 3 months and fine not exceeding Rs. 200; but it appears to me that it will not be safe at present to entrust the native Judges or the Subordinate Criminal Courts with the power of awarding punishment to the extent above mentioned upon summary conviction without appeal. That would be giving them greater power than is now vested in Justices of the Peace in England.† If the regular Courts of Justice be authorized to try criminal cases to the extent proposed by the Law Commissioners, I think it will be scarcely necessary to invest unofficial residents of the interior with criminal jurisdiction; and, if the proposed number of Deputy Magistrates be appointed, I do not think that it will be necessary or advisable to invest such residents even with power of committing offenders for trial. Upon this point, however, I would rather not express any positive opinion until after the Code of Criminal Procedure has been passed and the official establishments for the administration of criminal justice and police have been finally determined upon.

† In expressing this opinion, I wish to guard myself against its being understood to extend to trials before the Superior Courts and a Jury.

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## No. 50.

### PROCLAMATION OF PARDON AFTER MUTINY.*

*(29th May, 1857.)*

I FEEL it right to record shortly the following reasons which were urged by me against issuing this proclamation.

First, I think that the Government ought not, unless compelled by the most urgent necessity, to offer pardon to mutineers in open rebellion with arms in their hands, and at present I am not satisfied that any such necessity exists.

Secondly, I think that pardon ought not to be extended even to such, if any, of the troops who were stationed in Delhi as have not been guilty of murder or other heinous crime, and did not belong to regiments by which such outrages have been committed. By abandoning their duty and joining the mutineers, these men have enabled others to commit outrages which it was their duty to prevent.

And thirdly, it seems to me that we are not at present in a situation to judge which, if any, of the mutineers are entitled to have mercy extended to them.

2. The Government of India is no doubt placed in a situation of great difficulty by the proclamation issued by the Lieutenant-Governor of the North-Western Provinces and by His Honour's recent earnest solicitation. I should deeply regret to be obliged to do anything which may by possibility weaken his force, but I think that it would be so injurious to the interests of Government to allow that proclamation to be acted upon, that I would forthwith issue a proclamation stating that it shall cease to have effect from the time of the promulgation of the new one, except as to those who may previously have availed themselves of the offer of pardon made by the Lieutenant-Governor. It would not be right to break faith with any men who may have already availed themselves of the Lieutenant-Governor's proclamation. To this extent—and to this extent only—I would uphold it. I do not consider it necessary, either for the purpose of supporting the Lieutenant-Governor or for any other purpose, to continue in force the proclamation which he has issued or to make any offer of pardon by the proclamation to be issued.

3. When the mutineers shall have laid down their arms and submitted themselves unconditionally, it will be time enough to consider whether any of them who have not committed murder or other crime against person or property, and who did not belong to regiments which have committed such outrages, can make out a sufficient case to entitle themselves to clemency from Government.

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* See, too, Minutes Nos. 58 and 59, *post*, pp 118 and 122.

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## No. 51.

### APPOINTMENT OF DAY FOR PUBLIC PRAYER, ETC.

*(5th September, 1857.)*

IT appears to me that the appointment by Government of a day for a general confession of sins or for a general offering up of prayer is not adapted to a country like this in which a great mass of the people do not pray to the true God. It is impossible to deny that many Hindus are faithful subjects of the British Crown, and I do not think that such subjects can with propriety be invited to offer up their prayers to Almighty God, of whom they have no knowledge and in whom thay have no belief. If the invitation is to be considered as an exhortation by Government to all classes of the Queen's subjects to confess their sins and to offer up their prayers as a means of averting a great national calamity, it seems to admit the efficacy of the prayers of idolators. If it is considered as an exhortation to Christians alone, I think that it is objectionable for Government to interfere in a country in which the Christians form so small a portion of the Queen's subjects. I must confess that I cannot bring myself to entertain the same belief as that expressed by the gentlemen who have signed the memorial, nor do I think that the re-establishment of the British authority in India will be promoted by the appointment by Government of a day of humiliation and prayer to be observed by the Christian inhabitants. Entertaining that opinion and believing that it would be impolitic under the present circumstances to appoint a day for confession and prayer to be observed either by all the subjects of the Queen or by the Christian subjects only, I think it would be better to refuse to comply with the requisition of the memorialists, and to abstain altogether from fixing a day for prayer and confession of sins or issuing any exhortation or invitation upon that subject. In my opinion, it would be greatly misunderstood by the Native portion of the population, and, in addition to its being considered as a sign of fear, it would be understood by them as an admission that the present calamities are a judgment upon the Christians for their sins. I am very much confirmed in this opinion by many of the expressions in an intercepted letter from a sepoy to his uncle. The following is an extract :—

"The birds of the air do not move or wing without the Divine permission. God it is who does justice to us. May God put it into the heart of every Mussulman to destroy the infidels, and may he not leave one alive because they have subverted the Mussulman religion."

See letter from Resident at Hyderabad, Foreign Department, dated 17th August, 1857.

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## No. 52.

### Removal of Mr. Tayler from the Commissionership of Patna.

*(18th December, 1857.)*

I have read the whole of the papers in this case with great attention, and I am of opinion that the Government of India ought not to interfere with the decision of His Honour the Lieutenant-Governor of Bengal.

2. Mr. Tayler claims as a right his restitution to office; he relies upon the verdict of the Governor General in Council; and he prays that the order for his dismissal may be revoked, and that he may be restored to the Commissionership of Patna.

3. If it were necessary for the determination of this case to enter into the question of right, and to decide whether a civil officer can claim as a right to be retained in an office to which he has once been appointed, I should say that he has no such right, but that the Government to which he is subordinate can remove him at any time, subject to an appeal to the Hon'ble Court of Directors or to the Government of India, if the power of removal is exercised capriciously.

4. The Lieutenant-Governor is primarily responsible for the proper administration of the territories under his government, and I think that it would be mischievous in the extreme, if the Government of India were to interfere, except in a very unwarrantable case of removal, by ordering him to restore to office an officer in whom he cannot confide for the proper discharge of the duties belonging to it. It appears from the Minute* of the Lieutenant-Governor that such is the case as regards Mr. Tayler. His Honour states that, on the breaking out of the disturbances, his uneasiness and fears in regard to Mr. Tayler's fitness for the important post he occupied were greatly increased by the line of conduct Mr. Tayler thought proper to pursue towards him, which he soon found to be that of concealing from him as much as possible alike his acts and his intentions, and that he has since avowed that this was done wilfully and purposely in order to carry out views of his own, of which he thought His Honour would not approve. Further, he states that Mr. Tayler has not hesitated to disobey his orders (and that too in a matter of life and death) when obedience has happened not to suit his purpose or his own opinion of what was to be done. That statement, if not satisfactorily explained by Mr. Tayler, would of itself, in my opinion, be a sufficient ground for this Government's refusal to interfere; for, whether the views of the Lieutenant-Governor or those of Mr. Tayler upon the subjects upon which they differed, were the correct ones, I hold that no officer has a right to conceal from the Government under

* See Minute, dated the 5th August, 1857, paragraph 3.

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which he is employed, his acts or intentions in order to carry out views of his own which he thinks would not be approved of by such Government; and that he has no right to disobey orders, though they may not be in accordance with his own views. Therefore, even if I considered that the course pursued by Mr. Tayler in regard to calling in the civil officers from Gya and Mozufferpore was judicious, I should not think it right to order Mr. Tayler's restitution to the office of Commissioner of Patna.

5. But I cannot think that Mr. Tayler was right in calling in the civil officers from Mozufferpore and those from Gya,—together with all their force without leaving them any discretion to act as circumstances might dictate. It is unnecessary to consider whether he called in the civil officers from all the stations in his division or not. The Lieutenant-Governor avers * that he caused the abandonment of Nawadah, Barh and Sherly, and there is no doubt that it was the declared policy of Mr. Tayler that all the civil officers should concentrate for a time either at Dinapore or Patna, and that orders were issued in accordance with that policy. Indeed, in his letter to the Government of Bengal, Mr. Tayler says†—"I have authorized all the officials of the districts to come in to Patna." But his message to Mr. Money did not merely convey an authority to retire upon Patna if he should find that circumstances rendered if necessary so to do; it was a peremptory order to come in *with all his force*. The message runs thus—"You are to come in with all your force to Patna. If you can bring your treasure, you are to do it: but you will leave it if the bringing of it will endanger the personal safety of your party."

*See letter to the Government of India, dated the 22nd September, 1857, p. 9.

†See his letter to the Government of Bengal, dated the 31st July, 1857, p. 3.

The message to Mozufferpore was equally peremptory, and ran thus:—

"MY DEAR Mr. FORBES,

I have sent express to say the expedition to Arrah utterly failed. You must all come to one point, Dinapore. All ladies must go to Calcutta. Get in as quietly and as quickly as possible—185 killed; all the rest of 400 wounded. Arrah Garrison must fall I fear—sharp is the word."

At that time there were 44 European soldiers and 100 Sikhs at Gya. There was a treasury with eight lakhs of rupees and a jail containing 750 prisoners. The rebels had not crossed the Soane from Shahabad into Behar, and the nearest point to Gya at which they were likely to cross was at Urwal Ghat, a distance of about 40 miles. I say nothing of the 80 men of H. M's. 64th Regiment, who afterwards arrived at Gya, because I think that Mr. Tayler's order must be considered with reference to those facts only of which he had knowledge at the time. The order left Mr. Money no discretion, and, although both he and Mr. Hollings, after they had left the station and had proceeded

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about four miles on their road to Patna, determined in spite of the order to return to Gya, they were obliged to do so without the assistance of the 40 European soldiers and 100 Sikhs, who in consequence of the order had been withdrawn from Gya and were then on their road to Patna, and who ultimately joined that station.

6. Even after Mr. Tayler knew from the letter which he received from Mr. Trotter, the Judge of Behar, that Mr. Money and Mr. Hollings had returned to Gya in the hope of retaining the station, and that their position there was very unsafe in consequence of their having no other guard than the Nujeebs, he adhered to his order and refused to act upon the suggestion of Mr. Trotter that the force which was then on its way from Gya to Patna, should return to Gya so as to be a support to the other force, *viz.*, the detachment of H. M's. 64th Regiment which was expected to be there in a day or two. In his answer to Mr. Trotter, dated the 2nd August, after speaking of Kour Sing, Mr. Tayler says—"It is reported that he even meditates an attack on Patna and Dinapore." In another part of the same letter he says—"Here (meaning Patna), though strong enough, please God, to protect ourselves, we shall still be some time before we have sufficient force to re-occupy Shahabad (*which is the one important object of the day*) *and every addition therefore to our central force inasmuch as it hastens this end, is doubly valuable.*" It must not be supposed that Mr. Tayler, when he spoke in the above letter of re-occupying Shahabad, contemplated the relief of the small garrison at Arrah. At that time Mr. Tayler considered the relief of that garrison to be utterly hopeless: to use his own words, "the inmates were universally believed to be lost without hope of redemption." Even as far back as the 26th of July, Mr. Tayler, upon hearing of the murder of Major Holmes, had reached the small force consisting of 50 Sikhs, 25 Nujeebs and 20 Sowars, which had been sent out on the previous night to intercept the rebels and to prevent them from moving upon Arrah: and it also appears upon his own showing that, before he issued the order to the civil officers at Gya, *he himself* and the General, in concurrence with the other military authorities, had writen officially to Major Eyre begging him not to advance.

See his letter to the Government of Bengal, dated the 15th August, 1857.

See his letter dated 29th July to the Government of Bengal, paragraph 14, enclosed in letter from Bengal, dated 26th September, 1857.

See his letter to the Government of Bengal, dated the 13th August.

Looking at all the facts it appears to me that the original order calling on the civil officers with all their force from Gya, without leaving them any option to act according to circumstances, was very injudicious, and that Mr. Tayler's adherence to that order after he had been informed that Mr. Money and Mr. Hollings had returned to the station, and

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his refusal to allow the force which had left Gya to fall back for the support of Mr. Money and Mr. Hollings, who were then protected only by the Nujeebs and in great danger, was still more so. The notion that the addition of the small force from Gya to the central force could possibly hasten the re-occupation of Shahabad was, in my opinion, wild and preposterous.

7. I cannot say that the Lieutenant-Governor was wrong in removing Mr. Tayler. Certainly the removal under the circumstances by the Lieutenant-Governor, who was primarily responsible for the administration of the district, is not a case which calls for the interference of the Supreme Government. Mr. Tayler complains that he had been ignominiously dismissed without even having the opportunity allowed to him, which is allowed to the commonest criminal, of explanation or defence. But the facts regarding the order to Gya are undisputed, and, if the Lieutenant-Governor considered that Mr. Tayler's removal was necessary, the state of the times would not allow of the delay which would necessarily be caused by calling upon him for an explanation or defence. Mr. Tayler's explanation upon that point is now before the Government of India, and he has had the full benefit of it. He does not appear to have had an opportunity of answering or explaining the other charges brought against him in the first eight paragraphs of the Lieutenant-Governor's Minute, as they are not specifically alluded to in the letter from the Government of Bengal of the 4th of August. But, even if Mr. Tayler could satisfactorily answer those charges, the explanation could not make any difference in respect of the charge which was the immediate cause of dismissal. I do not, therefore, think it necessary to prolong this case by calling upon Mr. Tayler for an explanation upon those points.

8. Before concluding these observations, I think it right to remark upon the statement made by Mr. Tayler that he himself wrote officially to Major Eyre to beg him not to advance to the relief of Arrah. I find no copy of that letter, but, if he did, either officially or otherwise, write to Major Eyre to that effect, it appears to me that he greatly exceeded his powers; as a civilian I apprehend it was his duty to give every information in his power to the military authorities, and to leave them without any interference on his part to judge of the danger or safety of the advance from a military point of view. If his communication had been received and acted upon by Major Eyre, the small and brave garrison of Arrah must inevitably have been destroyed, and the greatest calamities would probably have followed.

9. I duly appreciate the great energy and perseverance displayed by Mr. Tayler during the trying times in which he was placed. I acquit him entirely of having acted under any apprehension of personal danger. Every allowance must be made for him under the critical circumstances by which he was surrounded. If he disobeyed the orders of the Lieutenant-Governor

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or intentionally concealed from him his acts or intentions, I attribute his error to an over zeal on his part to maintain the tranquillity of the division over which he was placed. I cannot, therefore, consider that his conduct was "disgraceful," and I regret that His Honour the Lieutenant-Governor should have so stigmatized it. And although I think that this Government ought not to interfere to reverse the order of the Lieutenant-Governor, I feel bound to express my opinion that nothing which appears in this case, has disqualified Mr. Tayler from holding a high appointment for the future. But it is not the duty of this Government either to direct the Lieutenant-Governor to appoint Mr. Tayler to any office, still less to prescribe the mode in which he should be employed. At present the Supreme Government has to deal with Mr. Tayler's appeal, and with that only.

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## No. 53.

### TREATMENT OF REGIMENTS DISARMED DURING MUTINY.*

*(2nd April, 1858.)*

IT is very difficult to say what ought to be done with the disarmed regiments. There may be particular exceptions, but, speaking generally, I have no hesitation in recording my opinion that they ought not to be retained permanently in the service of Government, or ever again to be entrusted with arms in this country. There may not be legal evidence to convict them; but there is sufficient moral evidence, in my opinion, to prove that they would have joined in the Mutiny, if their arms had been left in their hands and they had found an opportunity which they considered favourable, for carrying their intentions into effect. I cannot doubt that secret communications have been going on, and that all the native regiments of the Bengal Army had knowledge of facts which, if they had been loyal, they ought to have communicated to their Officers. I consider that they are no longer worthy of confidence, and that they are just as liable to be punished for the mutinous and rebellious conduct of the Army in general, as the individual members of a regiment are liable for the general misconduct of the regiment to which they belong, though no specific act can be brought home to them by legal evidence. I am, therefore, of opinion that the disbanding of every disarmed regiment would be perfectly justifiable. But it appears to me that disbanding alone is not sufficient. There are at present about 23 regular native regiments disarmed. To disband these regiments, and set loose all over the country from 16,000 to 20,000 disaffected men, trained to arms and without the means of gaining an honest livelihood, would be most dangerous. I do not think that such men would merge in the general mass of the peaceable population; on the contrary, I believe they would become a constant source of terror to the people, and

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* See, too, Minute No. 57, *post*, p. 116.

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would endanger the peace and tranquillity of the country. I therefore think that they should not be simply disbanded, but that they should be banished at least for a time to some other place where they may become peaceable and useful members of society. I would not treat them as convicts nor send them to a penal settlement, if it can be avoided. I believe many of our West India Colonies would be glad to receive them, and, with the consent of the Home authorities and of the Colonial Governments, I would send them there. An Act of the British Parliament, or at least of the Colonial Legislatures, would be necessary. Their families should be allowed to accompany them, and upon their arrival they should be treated as voluntary immigrants. They might be allowed after ten years' residence, of which five should be industrial, to return if by their industry and good conduct they should save enough to pay for their return passage and could obtain a certificate of good conduct. Their return under such circumstances would be so gradual and their characters would have been so altered during the period of their industrial residence, that no danger would be likely to arise from allowing them to return If arrangements cannot be made for sending them to the West India Colonies, I would send them to the Andamans in the first instance, and allow such of them to emigrate therefrom to the West Indies as could induce their families to accompany them. It may be argued that it would be unjust to deport men who have not been convicted of any crime; but if it be just to disband them and to deprive them of pay and pension, I think it is justifiable to remove them from this country, where their presence would be dangerous to society, and would be likely to impede the restoration of peace and tranquillity. It appears to me that there is no greater injustice in deporting any one of these men than there is in confining a State prisoner without trial. If it be just as regards one man, it is equally just as regards many, if the public welfare requires it. But if it be determined simply to disband, I think the present is not the proper time either for a general disbanding or for granting voluntary discharges. If such discharges are to be granted in sufficient numbers either to diminish the expense of the regiments or the labour of the European troops in watching them, I think it would be dangerous to the peace of the country, especially in the Lower Provinces where there are so few European troops, to set such men at liberty. I do not agree that they can be nowhere so dangerous as in our own camp. I think they are much safer under the control of our European troops than they would be if allowed to roam over the country wherever they may think fit, probably endeavouring to fan the flame of rebellion, robbing and plundering the peaceable inhabitants, destroying the electric telegraph, and secretly, if not openly, endeavouring to assist the cause of rebels—and this, too, just at the commencement of the hot weather, when it will be almost



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impossible for our European troops to follow them. If the disarmed regiments are simply to be disbanded, or if discharges are to be granted to such as may apply for them, I think it should not be done before the next cold season, and previously to doing so, I would pass a law rendering every discharged sepoy liable to transportation if found with arms. The fact that arms are supposed to be concealed in the neighbourhood of Barrackpore is, in my opinion, an argument against, rather than in favour of, granting discharges to men in the native regiments at Barrackpore. I cannot think that the present time is a favourable one for disbanding or granting discharges, when scarcely a month has elapsed since it was considered necessary to take unusual precautions for the protection of Calcutta against an outbreak, to postpone the ordinary relief of the Fort and Calcutta troops, and to send the returning troops by water. I do not mean to say that such precautions were not proper, but what I contend is, that the present is not a fit time to commence a general disbanding or to grant discharges to men who cannot be trusted, and thus to enable them to traverse the country where there are scarcely any European troops and where the inhabitants have not the same means as those in Calcutta of preserving tranquillity and of taking precautions for their own safety. At this very moment Rohilkhund is in the hands of the rebels, and Her Majesty's 37th Regiment is threatened at Azimgurh, and has been obliged to confine itself to entrenchments. It appears to me that our European troops have enough to do at present, and I would not add to their labours by enabling the rebels to swell their ranks by men from disbanded regiments or by discharged sepoys.

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## No. 54.

### Organization of Army.

*(10th June, 1858.)*

If the question were an open one, I should very much prefer a Commission such as that suggested by the Hon'ble Court, to the method of inquiry which the Right Hon'ble the Governor General has determined to adopt; but I understand that the question has been finally determined. If a Commission were to be issued, I think a constant change of Commissioners would very much detract from its usefulness.

2. I am disposed to think that it will be better that the Members of Council should not be called upon to answer the questions propounded, if they are to consider and form their opinions upon the whole of the evidence which may be elicited from officers of experience for their consideration and guidance. If, however, it be still desired, I will willingly answer the questions to the best of my ability.

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3. I earnestly join in the recommen ation of His Honour the President that, without advertence to the inquiries which may be found necessary with reference to the proper organization of the Army in India, the most energetic measures be adopted for providing an increase of European troops; but I think we should be careful not to increase too much the number of Native troops. His Honour the President remarks:—"The Native Army cannot, at the least, be much less numerous than the European Army: let us say it cannot be less than two-thirds of the Queen's and Company's troops in India." We might safely, I think, exceed that proportion of Natives, but at present, according to the last return made up to the 15th April last, there are in the Bengal Presidency, including the Punjab,—

| | |
|---|---|
| Native troops armed . . . . . | 72,419 |
| Ditto disarmed . . . . . | 17,463 |
| Total | 89,882 |

Whereas there are only 49,581 European troops, of whom only 44,581 were effectives and 5,000 sick.

## No. 55.

### Appointment of Military Officers to Civil Posts.

*(6th August, 1858.)*

I see no objection to asking for the report suggested by our hon'ble colleague Mr. Ricketts.

2. It appears to me that Military officers ought not to be employed in offices of a purely civil nature, such as those in the judicial line, etc. If they are to be placed upon an unattached list and their places in their regiments to be filled up, there can be no advantage in employing them in preference to gentlemen in the Uncovenanted Service who may have qualified themselves for discharging the duties.

## No. 56.

### Departmental Recommendations for Appointments.

*(23rd September, 1858.)*

I fear that I have been misunderstood by His Honour the President. I did not intend to express an opinion that the Director-General ought to nominate to all vacant medical appointments, but merely that he ought to be consulted officially, and that his opinion and advice ought to be given officially. His Honour the President proposed that the Director-General should be



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demi-officially informed that, after the system of his reporting vacancies is in force, it will rest with the several Heads of Government of the day to settle, each one for himself, how the consultation concerning the fittest successor shall be carried into effect. Having referred to the papers, I wrote—"I would not send the demi-official letter proposed. It apears to me that the Director-General ought to be officially consulted, and that his opinion ought to be given officially." I still retain that opinion, and I concur generally in the remarks of our hon'ble colleague Sir James Outram. There can be no doubt that the responsibility for every appointment ought to rest with the Government, and that the principle of selection, and not of seniority, ought to be acted upon. It is admitted that the opinion and advice of the Director-General is to be sought in all medical appointments. Now, if such opinion and advice is necessarily to be sought from an officer because he has been selected for, and holds a certain official position, it appears to me that his opinion and advice ought to be given officially and in such a manner that, without relieving the Government from any responsibility for the appointment, the officer consulted may also be responsible for the opinion and advice which he may give. It is always a painful duty to be obliged to pass over a senior officer; but I cannot think that that duty will be rendered less disagreeable to Government or to the Director-General, or less painful to any officer who may be passed over, because the advice of the Director-General may have been given privately and confidentially, instead of openly and officially.

2. It is agreed that Government is not necessarily to be bound by the advice and opinion of the Director-General, but it will be known to the whole profession that the rule requires his opinion to be taken. It is not probable that the Government will act in many cases in opposition to his advice, but, should they do so, it would be unfair to the Director-General not to record his opinion, even though he should recommend an officer to be passed over as incompetent for the duties. On the other hand, should Government pass over a particular officer contrary to the opinion of the Director-General, it would be unfair to the officer not to record the opinion in his favour.

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## No. 57.

### Treatment of Regiments disarmed during Mutiny.*

*(8th November, 1858.)*

If any of these men are willing, without solicitation or compulsion, to join the Corps in Burmah or China and to engage for general service, I would allow them to do so. But I would not at present disband or threaten to discharge

* See too, Minute No. 53, *ante*, p. 112.

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such of them as do not volunteer for such service. All who consent to serve in China should engage for general service; for, if once re-armed for service in China, they cannot be disarmed again when their services there are not required. Those who are willing so to engage, should, I think, be allowed to count their previous service for pension. I do not think that it would be right to act upon the suggestion of General Hearsay and to transfer to Police Corps such of the sepoys as may not wish for their discharge. If they cannot be trusted as soldiers, I do not see how proper confidence can be placed in them when serving in Police Corps. Our hon'ble colleague Mr. Ricketts would avail himself of the presence of the European troops in or near Calcutta, and would at once disband all who may not volunteer to serve in Burmah. It is, no doubt, very inconvenient to keep them at Barrackpore, and considerable expense is thereby incurred. But, in my opinion, there is much less danger in leaving them where they can be kept in check by European troops than to allow them to disperse over the country without the means of subsistence. To do so in the present state of affairs would in all probability drive them to become either rebels or robbers. When once disbanded and discharged, they will cease to be subject to military control, and, if after they have been disbanded they were all to go off at once, there would be no authority by which they could be lawfully restrained. I should, therefore, prefer leaving them where they are at present until the country is more settled, and at any rate until the Military Police Corps have been organized in Bengal. By that time we shall have seen the effect of Her Majesty's proclamation. It would be better in my opinion to discharge them by twenties or thirties at a time than to disband them at once. But I would not even do that until a resolution shall have been come to in regard to all the disarmed regiments. To do so would cause a feeling in the minds of the whole body which it is better to avoid, and it would be rather inconsistent with the offer which has already been made to grant discharges to such as were desirous of quitting the service. It would, moreover, be looked upon as a punishment and would in substance have that effect, and I cannot think that this is a proper time for doing anything which will have that appearance when Her Majesty has only just proclaimed pardon, amnesty and oblivion of all offences, even to those who have actually taken up arms against the Government. I would wait until the proper time arrives for dealing with the whole of the disarmed regiments, and then, if it should be considered necessary to dispense with the services of all or any of them, the matter should be fully and frankly explained, as suggested by the Secret Committee in their Despatch No. 1938, dated the 24th March, 1858; and all who may be discharged should be dealt with in that fair and liberal spirit, which has been pointed

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out in that despatch. I do not think that we ought now to deal with them otherwise. A batta of three months' pay, which has been suggested, would enable them to live honestly until they could reach their homes and devote themselves to some new mode of gaining a livelihood.

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(COPY)

MINUTE BY THE HON'BLE B. PEACOCK.

*(Dated 18th November, 1858.)*

I RETAIN the opinion expressed in my Minute of the 8th instant.

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## No. 58.

### PROCLAMATION OF PARDON AFTER MUTINY.*

*(24th November, 1858.)*

I CONCUR with His Honour the President in thinking that the words "British Subjects" are used according to their common acceptation in India. They have hitherto been used in that sense in Acts of Parliament and in Charters of the Crown, and, as observed by the President, the use of the word "subjects" alone in other parts of the proclamation shows that the word "British" was intended to have a restrictive operation. Still, I think that it could not have been intended to pardon offenders guilty of cold-blooded murder or mutilation, though their victims might be European foreigners, or Eurasians, or "Natives of India" in the ordinary sense of the word; and, in my opinion, the proclamation does not promise pardon to such offenders.

2. The pardon is not a pardon of all offences, but merely of offences against Her Majesty, Her Crown and Dignity—in other words, political offences, such as treason, rebellion, mutiny, desertion, etc., and, even as to such offenders pardon is not offered to those who fall within the exceptions mentioned in paragraphs 13 and 14 of the proclamation. The words "all offenders" in paragraph 13 are restricted by the context; otherwise they would extend to all offenders, no matter what their crimes were or when they were committed, and the cold-blooded murder of a foreigner, forgery, perjury, embezzlement and all offences whether connected with the rebellion or not, would be pardoned, even though they might have been committed before the Mutiny broke out. It is clear that the proclamation was never intended to have such an effect, and that the general words "all offenders" in paragraph 13 are limited by the context.

* See, too, Minutes No. 50, *ante*, p. 106 and also No 59, *post*, p. 122.

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3. The following words in the preceding and subsequent paragraphs show that paragraph 13 must be read as if it said "our clemency not be extended to all offenders in respect of *offences against Ourselves, our Crown and Dignity* save and except, etc."—"We deeply lament the evils and misery which have been brought upon India by the acts of ambitious men who have deceived their countrymen by false reports and *led them into open rebellion.* Our power has been shown by the suppression *of that rebellion in the field.* We desire to show Our mercy by pardoning *the offences of those who have been thus misled,* but who desire to return to the path of duty." "Already in one Province, with a view to stop the further effusion of blood, our Viceroy and Governor General has held out expectation of pardon on certain terms to the great majority of those who *in the late unhappy disturbances* have been guilty *of offences against our Government,* and has declared the punishment which will be inflicted on those whose crimes place them beyond the reach of forgiveness. We approve and confirm the said act of our Viceroy and Governor General, and do further announce as follows:—(Paragraph 12) "To those who have willingly given asylum to murderers or who may have acted as *leaders or instigators in revolt* their lives alone can be guaranteed: but, in apportioning the penalty due to *such persons,* full consideration will be given to the circumstances under which they have been induced to throw off their allegiance, etc." "To all others in arms against our Government We hereby promise unconditional pardon, amnesty and oblivion of all offences against Ourselves, our Crown and Dignity." If paragraph 13 included all offenders except those guilty of the crimes specially excepted, paragraph 15 would have been unnecessary. It is, therefore, only in respect of offences against Government that a promise of pardon is offered, and, even as regards such offences, pardon is not to be extended to those who fall within the exception. Murder or mutilation is not one of the offences included in the pardon whether the offenders fall within the exception or not.

4. But as the carrying on of war against Government is one of the offences pardoned, it appears to me that every offence committed in the prosecution of such warfare which, according to the common laws of war, would be justifiable on the part of a foreign enemy, is pardoned as incidental to the unlawful and criminal warfare which has been pardoned, provided the offender complies with the conditions upon which pardon is offered, and is not one of those excepted by the terms of the proclamation. In determining what is and what is not murder liable to punishment, or what is and what is not murder sufficient to exclude political offenders from the benefit of the amnesty, regard must be had to the circumstances under which the death was caused. If it was caused in open battle, I think it is pardoned, even though the offender could be identified as having killed a European officer. On the other hand, the murder or mutilation

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of a prisoner of war, or of any person, whether a European or a native, under circumstances exceeding the limits of legitimate warfare is not pardoned, for such an act, if committed by a lawful enemy, would not have been justifiable by the common laws of war, and is, therefore, not pardoned as an incident of war. If the murderers of Captain Orr, for example, could be identified, it appears to me that they should be punished in the same manner as those who murdered Sir M. Jackson—not for an offence against Government, but for the crime of murder not justifiable by the laws of war, and, therefore, not pardoned as an incident of the war. In the same manner it appears to me that no offence against private individuals is pardoned unless committed under circumstances rendering it justifiable by the laws of war. The above view seems to be in accordance with that expressed by the Secret Committee in their Despatch, dated the 24th March, 1858, paragraphs 3 and 4. The Circular issued by the Government of the North-Western Provinces, dated 6th November, 1858, paragraph 4 seems to exclude all murderers from the benefit of pardon for political offences; but the words "murder of British subjects" are used in paragraph 4 of the Circular of the 5th November, which is referred to in paragraph 5 of that Circular. Paragraph 5 of the Circular of the 6th November declares that the amnesty does not cover acts of private wrong and injury.

5. The rule which is adopted in one part of India should be adopted throughout, but I am not quite certain that the words "private wrong and injury" were intended to include cases such as those put by Mr. Samuells in paragraph 4 of his letter dated the 3rd November, 1858, or to include the case of murder committed in open battle. I therefore concur with the President in thinking that the papers should be submitted to His Excellency the Governor General. The amnesty does not affect civil actions for injuries committed. Whatever view may be taken of the question whether private offences committed within the limits of legitimate hostilities are pardoned as incident to the offence of carrying on war, I entirely concur in the spirit of paragraph 5 of the Circular of the 6th November, 1858, which declares that prosecutions for acts of private wrong and injury should be discouraged, unless they be such, (to use the words of the Secret Committee in their Despatch of the 24th March, 1858) "as it would be a crime to forgive." The murder of Captain Orr, who, I believe, was not a British subject within the ordinary acceptation of those words in India, the torture, murder and mutilation of native officials because they have been true to Government and done us good service, are instances. Men who can be proved to have been guilty of such crimes ought not to be allowed the benefit of the amnesty, and, in my opinion, do not come within the terms of it.

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6. I agree with His Honour the President in his construction of the words "of having directly taken part in murder" in paragraph 13 of the proclamation.

7. I am of opinion that the offer of pardon does not extend to persons who had been convicted before the proclamation, or to cases of property in respect of which an adjudication of forfeiture had been passed under Act No. XXV of 1857 unless in the latter case the owner of the property shall entitle himself to restitution under the provisions of section 8 of that Act. The proclamation above will not entitle the owner to restitution after adjudication, though I think it will in the case merely of attachment under section 10. In the latter case, as a trial cannot be had, the suspense cannot be legally confirmed.

8. I concur with the President that according to the spirit of the proclamation, no fine should be imposed upon a village for any offence which, if committed by an individual, would fall within the terms of the amnesty. But in the case of heinous offences not included in the amnesty, committed by the inhabitants of a village, or in cases in which Europeans have been murdered, I think that the whole village may reasonably be punished. But, as observed in the Legislative Despatch from the Secretary of State, No. 1 of 1858, the instances should be carefully selected. I should remark that that despatch bears date the 29th September, 1858, and was, therefore, written after the Secret Despatch dated the 9th September, by which Her Majesty's proclamation was accompanied.

9. I am of opinion that the amnesty does not extend to offenders who were convicted before it was published. In strictness it may not extend to persons apprehended or committed for trial before it was published, because they cannot comply with the condition, but I think that, according to the spirit, all persons who had not been convicted, should be discharged upon condition that they return to their homes and peaceful pursuits and, if necessary, give security for their good behaviour, provided they are not detained or in custody upon a charge of an offence not included in the offer of pardon and are not excepted from the terms of the proclamation. This appears to be in accordance with the view of the Governor General. There is a great distinction between persons under trial and those convicted before the proclamation was published. It has been held that a general pardon of all felonies does not discharge a previous attainder or conviction. The distinction does not rest upon the point that the offender cannot in either case comply with the condition by returning to his home and peaceful pursuits, but upon the ground that after the conviction the case has been adjudicated, whereas in cases merely of committal, the pardon may be pleaded at the trial. If the pardon extends to persons convicted, all the prisoners at the Andamans

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must be released; but such a construction ought not, in my opinion, to be put upon the proclamation. This answer applies to the question put by the Bombay Government in paragraph 3 of the duplicate letter No. 205 of 1858, dated 1st November, 1858.

10. With reference to paragraph 6 of that despatch, I am of opinion that persons committed or detained under charge of having committed an offence not pardoned by the proclamation or which would upon conviction exclude them from the benefit of the amnesty, ought not to be discharged before acquittal. I am also of opinion that the proclamation does not extend to persons detained under the provisions of Regulation III of 1818, of the Bengal Code, or XXV of 1827, of the Bombay Code. Many of those persons who are mentioned in that paragraph are probably detained under those Regulations and not for trial. Even if they have been committed for trial for political cases, they may be detained as State prisoners if the facts warrant it, notwithstanding that they may be entitled to the benefit of the pardon for the offences in respect of which they were committed for trial.

## No. 59.

### PROCLAMATION OF PARDON AFTER MUTINY.*

*(9th December, 1858).*

THE amnesty did not offer pardon for offences which might be committed between the time of its being known and the period of January next. In my opinion, it was not necessary to call upon the rebels to give up the murderers as the condition upon which their submission could be received. It would have been sufficient to tell them that those who were guilty of the murder would be liable to punishment. But Mr. Money acted according to the best of his judgment at a moment which must have been very trying and one of great anxiety. I am of opinion that he is entitled to the greatest credit for his courage and candour. It will be right to explain most fully and clearly the sense in which the Government understands the proclamation, and in which it will be acted upon. But in my opinion it would have a bad effect to issue any proclamation altering the terms offered by Her Majesty to leaders or instigators in revolt, promising that they shall not be transported. I do not think that the Government of India ought to enlarge the terms of the amnesty already proclaimed—that is my principal reason. But I would also remark that *imprisonment for life* is not a punishment which can be awarded: the punishment for rebellion is death, transportation for life or imprisonment not exceeding 14 years,

* See preceding Minutes Nos. 50 and 58, pp. 106 and 118.

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It appears from Mr. Money's narrative that the leaders wanted a free pardon. The question as to transportation did not originate with them. The question asked was—"Will they be imprisoned and irons put on their legs?" And Mr. Money in his answer candidly admitted that the worst would be liable to transportation. If the Governor General should be of opinion that all acts fairly connected with the warfare carried on against Government are intended to be pardoned, I think it would be well to make it generally known that such is the construction of the proclamation which will be acted upon by Government. It is evident that the rebels are afraid of being punished for looting and plundering. Such acts when connected with the state of warfare would, in the case of a foreign enemy, be buried in oblivion by a treaty of peace, and I think that pardon for such offences when connected with the war was intended to be offered. In the case of a foreign enemy, "booty becomes the property of the captors, and is looked upon as relinquished by the former owners on account of the difficulty of recognizing it and the little hope they entertain of ever recovering it." The same principle should, I think, be applied with regard to rebels so far as criminal proceedings are concerned, leaving the owners to enforce restitution of their property (if they can identify it) by means of the Civil Courts. Injuries committed during the war, but which have no connection with it, in my opinion, are not included in the proclamation. I have already expressed my opinion that no injuries connected with the war and committed in the prosecution of it, were intended to be punished criminally except such as exceeded the legitimate bounds of hostilities, such as murders and personal injuries of a cruel nature committed contrary to the common principles of humanity and not in open battle. If this could be fully explained, I think it would have a beneficial effect.

2. I do not, of course, allude to the offences specially excepted by the proclamation, but I would remark, in reference to the question put to Mr. Money as to what would be done to Subadars and Jemadars, and the answer given to it, that, in my opinion, the words "those who have acted as leaders and instigators in revolt" used in the proclamation had reference to the authors and instigators of revolt, and not to Subadars and Jemadars merely because they may have held high command among the rebels during the war. Such, then, in my opinion, without further proof were not intended to be included in the exception as leaders. If so, this should be explained, as a contrary belief may probably have an injurious effect.

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## No. 60.

### REVENUES OF HYDERABAD ASSIGNED DISTRICTS.

*(25th January, 1859.)*

I CONCUR entirely in the remarks of His Honour the President as regards the rendering of accounts and as to the items noticed in paragraph 5 of his Minute of the 5th instant.

2. With respect to the reply, I concur with the Governor General, and would answer the Resident's letter in the terms proposed, and I would authorize him either to state or withhold the reasons for rejecting the first three propositions as he may think best.

I do not think that the Nizam's Government ever intended that the disbursements, including the payments authorized by Article 6 of the Treaty, should in any one year exceed the revenues. On the contrary, I think it was the intention of Article 8 that only the disbursements of the year should be included in the yearly accounts to be rendered, and that after payment of the items detailed in Article 6 any surplus of receipts over the disbursements of the year should be made over to the Nizam. If he be willing to allow money for public works to be borrowed from the *Saucars* and the interest to be charged to the districts, well and good. But I think it would be contrary to the intention of the Treaty for the British Government to expend its own capital upon public works, and to charge the amount with interest against the revenue of the districts. Such a measure would, I have no doubt, cause great distrust and ill-feeling on the part of the Nizam.

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## No. 61.

### PUNISHMENT OF NAWAB OF FARRUKHABAD FOR REBELLION.*

*(12th April, 1859.)*

I HAVE read all these papers very carefully, and have come to the conclusion that the sentence ought to be carried into execution.

2. There can be no doubt that the prisoner was a leader in rebellion, and it is quite clear that he owed allegiance to the British Government. He has therefore been very properly convicted of the offence charged against him in the first count. For that offence, however, his life is spared by Her Majesty's Proclamation.

3. It is unnecessary to come to any decision as to the first charge in the 2nd count, as it appears to me that the Special

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* See, too, Minute No. 62, *post*, p. 130.

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Commissioners have come to a correct conclusion in their finding upon the 2nd, 3rd, and 4th charges of that count, viz., that the crimes which form the subject of those charges were committed "if not by the prisoner's direct order, with his express sanction and permission." I agree with the Special Commissioners upon the subject of duress. I believe that the prisoner authorized the commission of the murders to which those charges relate, and that his sanction was not extorted from him by a present fear of death, which, even if it had existed, would not have excused him.

4. I think it is very probable that the prisoner would not have ordered or sanctioned the execution of the prisoners at the time when those executions took place, if he had not been pressed to do so, that he did not feel sufficiently certain at that time that the power of the British Government would be overthrown to warrant him in incurring so great a risk as the destruction of the European prisoners, and that he would have awaited the result of the siege of Delhi before he gave orders for the disposal of the prisoners. But when he was pressed by the leaders of the Native soldiery to destroy the prisoners, he seems to have given his consent rather than incur their displeasure, knowing that they had the power to remove him from the guddee, and that it was his interest to conciliate them.

5. The witness No. 2 says, "When Ganga Singh and the Resaldar and Tolingas came, they said, 'Take them,' meaning the prisoners, 'out and bury them in a well; don't keep your enemies;' the Nawab replied 'No, you go and take Delhi and then you can do as you like.' They said, 'We will make whom we like king.' They came and asked for the ladies. The Nawab said, '*Don't do it in my place, you can do as you like*' This conversation took place the day before the ladies were killed." It is unnecessary here to enter into the details connected with the murders. It appears from the resumé drawn up by the Special Commissioners (Document No. 7, p. 6) that "the women and children were taken in vehicles then in the possession of the prisoner, dragged by the prisoner's cattle, under a guard of the prisoner's sepoys, to the parade ground where they were destroyed by the fire of guns, not blown away from guns as generally believed; that on the parade were Cotwallie Sepoys, the Nawab's own servants, as well as Tolingas, and that one of the victims, supposed to be Miss Sutherland, who survived the fire, was killed by sword wounds inflicted by a man belonging to the Nawab, and that during the enactment of this pitiless tragedy, the prisoner was possessed of real authority." Looking at the whole case, I am of opinion that the finding of the Special Commissioners is warranted by the evidence, and, if so, it appears clear that the prisoner is guilty of having directly taken part in the murder of British subjects, for, if the prisoner's sanction of the execution of prisoners in the custody of his

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officers, given by a person in the situation of the prisoner, does not amount to directly taking part in their execution, I know not what act short of personally committing the deed could be included in that expression, and thus many, for instance, the Nana, may escape with impunity. If the words "directly taking part in the murder, etc." do not include accessories before the fact, such accessories would be in a better position than accessories after the fact, of whom it is declared "that their lives alone can be spared." If it were necessary, which I think it is not, to show that some of the unfortunate victims were Europeans, it is proved by the prisoner's own defence. In that he speaks of his having been informed that the *Europeans* had left the fort, and that two Companies, two guns and some Sowars had been sent after them. He mentions the arrival of the prisoners in the custody of sepoys, and speaks of his having sent his old Khansamah who used to prepare dinners for the *English* when he entertained them *and who was known to them.* If the prisoner was guilty of having directly taken part in the murder of British subjects, Her Majesty's Proclamation has distinctly declared that "the demands of justice forbid the exercise of mercy."

6. The only question remaining is whether, in the face of that Proclamation, the Government ought, in consequence of Major Barrow's letter, to extend mercy to the prisoner. I am of opinion that they ought not.

7. The Secretary seems to consider that Major Barrow's letter held out to the prisoner that he might come in in safety if he had not *in person perpetrated the murder of English people.* In the translation of that letter sent up by Mr. Batten, the words are "if you have not been *personally concerned* in the murder of English people." I consider that there is a great difference between the expression "if you have not *personally perpetrated murder*" and "if you have not been *personally concerned in the murder of English people.*"

8. The Special Commissioners have found the prisoner guilty of being an accessory before the fact to the murder of 22 persons or thereabouts, being Europeans, East Indians and Native Christians, men, women and children. If the prisoner expressly sanctioned and permitted those murders which, in the judgment of the Special Commissioners, he did, I think that he was personally concerned in the murders, although he did not personally murder them and was not present at the time. But even if the letter is to receive the construction put upon it by the Secretary, the Government is relieved from much embarrassment by the answers of Major Barrow. In his answer to the telegram from this Government Major Barrow says he meant to convey by the word "Bezat" that if the Nawab was in any way accessory to the murders, that he had no reason for omitting the word "Shurrut" and

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that he sent the Nawab the Proclamation and therefore did not specify all its obligations. That on the Nawab's appearing before him he said to him "you have seen Her Majesty's Proclamation and are aware that those *concerned* in the murder of Europeans will be tried for their lives;" he admitted that he had seen the Proclamation, but said he was innocent of any such crime. I said "you are accused of this offence; I arrest you and shall send you for trial to Fatehgarh." Further on he says "The Nawab, I think, understood the letter, but in my conversation with him *the terms of the Proclamation were discussed entirely and not the letter.*" He never referred to the letter and quite understood that he had come in on the terms of the Proclamation. Moreover, the Proclamation was transmitted to the rebel Nawab by one Fuzzul Hossein who had been himself among the rebel leaders and came in offering to bring in others. He had passed between the camps more than once, and was on this occasion sent with the Proclamation to the Nawab with others, to explain it and to convince him that it would be acted on, and the only modification pointed out was as to the period of the Proclamation having expired. In his letter 1562 of the 7th January to the Chief Commissioner of Oude, before any question had been made respecting the letter written to the Ex-Nawab, Major Barrow, in speaking of the surrender, says—"In my correspondence with these parties during the last week I gave the Nawab of Farrukhabad and all others *clearly to understand that they would have to answer any charges against them of being concerned in the murder of European subjects.* The Nawab understands his position being placed under confinement." In paragraph 4 of his letter of the 3rd March, Major Barrow adds "as regards the matter of my letter to the rebel Nawab, it bears throughout a reference to the Proclamation and its terms; my full intention at the time of writing and at our Conference was that if the Nawab had been *in any way concerned in the murders at Farrukhabad he would under the Proclamation be held responsible for them.* I trust I have shown that the meaning of all my communications with the Nawab was that he should stand his trial under the terms of the Proclamation for his share in the murder of *English subjects.*"

9. It seems clear therefore that the Nawab had seen the Proclamation before he came in, and that he came in upon the terms of it; that he never referred to the letter and fully understood that he had come in upon the terms of the Proclamation; that upon the Nawab's appearing, Major Barrow said to him "you have seen Her Majesty's Proclamation and are aware that those concerned in the murder of Europeans will be tried for their lives;" that he admitted he had seen the Proclamation, but said he was innocent of any such crime.

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10. The Nawab has never said that he acted so far upon the faith of Major Barrow's letter, that he would not have come in under the terms of the Proclamation, nor did he, when Major Barrow explained to him that those who were concerned in the murder of Europeans would be tried for their lives, refer to the letter for the purpose of showing that he was under a different impression, and that according to his understanding of the terms upon which he surrendered he was not to be tried except for the offence of having *personally* committed the murder of Europeans. His case is that he neither committed the murders nor was accessory to them. He has never contended that he was willing to take his trial for having personally committed murder, but that he would not have surrendered if he had not been led to believe that he was not to be subjected to the risk of being tried as an accessory. This, I think, he would have done if he had perceived the difference between the letter and the Proclamation, and had been induced to come in by the letter when he was unwilling to submit upon the terms of the Proclamation.

11. It seems unnecessary to contend that the Government would not have been bound by Major Barrow's letter even if it had been proved that the prisoner came in under it for Major Barrow has clearly shown that the prisoner came in under the Proclamation and not under the letter. But if the question had arisen I should have had no hesitation in declaring that in my judgment the Government would not have been bound by the letter. So far as it differed from the Proclamation it was wholly *ultra vires*.

12. There are many cases in which Government have refused to be bound by the unauthorized act of public servants holding high positions, though the parties acting upon them could not be placed *in statu quo*. Suppose Major Barrow, instead of writing to the prisoner, had circulated a general notification to the same effect, and the Nana and others had come in and surrendered themselves under it, could it have been contended that the Government was bound morally or in point of honour to ratify the unauthorized act? If not in that case, why in this? I see no difference in principle. I think the Government should pause before they admit the principle that in such a case they are bound to ratify such an unauthorized act on the part of a public officer. It is impossible to say to what extent it may be carried. If they are bound by the letter of Major Barrow, which after all amounts only to putting his own construction upon the Proclamation, it may hereafter be contended that they are bound by similar acts of a Magistrate or even of a Deputy Magistrate or of an officer in command of a detachment. The Proclamation has been published; it declares that, with regard to those who shall be convicted of having directly taken part in the murder of British subjects, the

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demands of justice forbid the exercise of mercy; that to those who have willingly given asylum to murderers knowing them to be such, or who have acted as leaders or instigators in revolt, their lives alone can be guaranteed. If in the face of that Proclamation, which has been made known as widely as possible, the Government is bound to ratify the act of a public officer who states that Government has forgiven all except those who have personally committed the murder of Englishmen, the whole policy of Government may be frustrated. I would remark that the letter of Major Barrow makes no distinction between offences for which the life of the offender can alone be guaranteed, and those for which no mercy can be shown. It is the case of full pardon or nothing. If the Government are bound to ratify the act of Major Barrow at all, they are, in my opinion, bound to ratify it to the full extent. To transport the offender would be as much a violation of the terms of the letter as the execution of a capital sentence. I am of opinion that the sentence should be carried into execution not only for the punishment of the prisoner, but as an example for the future. I think it will be extremely injurious to allow it to be supposed that a Native Ruler in the position of the Ex-Nawab can be found guilty of being an accessory before the fact to atrocities such as those which have been proved in this case and yet escape punishment. Many technical objections have been taken by Mr. Carruthers on the part of the prisoner, but none of them affect the real merits of the case. I cannot discover any irregularity by which the prisoner can have been prejudiced in his defence or can have been otherwise injuriously affected. He appears to me to have had a most fair and impartial trial, and every opportunity has been afforded to him of defending himself against the charges brought against him. I cordially concur in the commendation which has been bestowed upon the Public Prosecutors and the Special Commissioners by His Honour the Lieutenant-Governor.

13. I regret that Major Barrow was not more careful in conveying to the Ex-Nawab the substance of Her Majesty's Proclamation, and that this Government has been placed in a position of embarrassment by his having deviated from the express terms of that document. I am of opinion that the explanation which he has given for addressing the Nawab by such a title as that at the head of his letter, is wholly unsatisfactory, and I am at a loss to conceive how he could bring himself to address a rebel in arms, and one who was suspected of having been guilty of the cruel and atrocious murder of unprotected and defenceless women and children who had fallen into his power as "the Nawab Sahib gracious to your sincere friends, may God Almighty preserve him."



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## No. 62.

### PUNISHMENT OF NAWAB OF FARRUKHABAD.*

*(5th May, 1859.)*

I HAVE read very carefully all the Minutes which have been recorded in this case, and I cannot see any reason to alter the opinion which I expressed in my Minute of the 12th ultimo.

2. I concur entirely in the reasoning adopted by our Hon'ble Colleague Mr. Grant in his very able Minute of the 30th ultimo in support of the conclusion at which he has arrived that the prisoner was not misled by Major Barrow's letter, nor induced to come in because that letter offered terms more favourable than those which had been offered by Her Majesty's Proclamation. I think there can be no doubt that the prisoner saw the Proclamation before he surrendered, for although Mr. Russell does not allude to the fact of the Proclamation having been spoken of at the interview with Major Barrow, I have no reason to doubt the correctness of Major Barrow's recollection upon that subject. The Proclamation was evidently in Major Barrow's mind from the first. It was expressly referred to in his letter No. 6, and he states in his answer to the telegram that he can swear from the Nawab's own admission to him that he had undoubtedly received a copy of the Proclamation when he came in. It appears to me to be a remarkable feature in this case that when the prisoner was charged on the trial with the offence of being a leader in rebellion, and as an accessory before and after the fact to the crime of murder, neither he nor his attorney relied upon Major Barrow's letter to show that he had been exempted from trial except for the crime of having personally perpetrated the crime of murder of British subjects. He merely pleaded that he was not guilty. The letter was never produced until the prisoner was called upon for his defence and after it had been seen what evidence had been adduced on the part of the prosecution. Even in the prisoner's petition, although he says that he came in upon the terms of Major Barrow's letter, he nowhere states that he had been misled by it or that he believed that he was not to be tried except for having personally perpetrated the crime of murder. The reliance placed upon the terms of Major Barrow's letter and the difference between the effect of that letter and the Proclamation appear to have been an after-thought probably after consulting with his attorney. If the prisoner had expressly ordered his own sepoys to take the ladies and children from the fort and blow them from guns, he would not have come within

* See, too, preceding Minute No. 61, *ante*, p. 124.

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the terms of Major Barrow's letter unless he had been present and had personally assisted in the murder any more than he does under the circumstances proved against him. In that case he would have been only an accessory.

3. Even if he had given those orders and had stood by and witnessed the execution, he would not have come within the words of the letter unless he fired the gun. I believe that the prisoner is guilty. I believe that he has not been misled, and I feel confident that he was not induced to surrender by means of trickery. I am of opinion that the sentence of death ought to be carried into execution.

Our Hon'ble Colleague Mr. Ricketts says "a great offender has fallen within the power of the law by trickery." I cannot admit that such was the case. I do not think that Major Barrow intended to misrepresent the terms of Her Majesty's Proclamation for the purpose of inducing the prisoner to surrender. He may have been mistaken in his opinion as to the terms of the amnesty. He is open to the charge of great carelessness in representing what he considered to be its effect. He employed language which, in my opinion, ought not to have been used by a British officer addressing a rebel in arms against Government, and who was suspected of having been concerned in the cold-blooded murder of defenceless women and children, but I do not consider that he is open to the charge of trickery.

4. In my former Minute I expressed the opinion that Government should pause before they admit that they are bound to ratify such an unauthorized act on the part of a public officer. Since that Minute was written, I have learnt from a telegram that Major Richardson informed the Nana that he might come in on the same terms as the Nawab of Benda or the Nawab of Farrukhabad or to that effect. I do not consider that Major Barrow as Civil Commissioner had any greater authority to offer terms at variance with the express declaration of Her Majesty's Proclamation than Major Richardson. The Government has taken measures to prevent the repetition by Major Richardson of such an unauthorized act. But suppose the Nana had surrendered in consequence of Major Richardson's letter; for all I know he may have actually surrendered upon the faith of it. It would be lamentable if Government should consider themselves bound in honour to ratify such an unauthorized act, and to allow the Nana to go free. How can we say that this case may not form a precedent? If, however, it be determined to release the prisoner, I do not see how the Government can lawfully declare him an outlaw or subject to be executed summarily by any officer of Government by whom he may hereafter be apprehended in the British territories. Indeed, even if the Government had the power, I think it would be very



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inexpedient to exercise it. A sentence of death ought, in my opinion, to be executed in due form and by the proper officer of justice. I think it would not be advisable to issue an order which would authorize any officer of Government into whose hands the Nawab may fall, it may be two or three years hence when peace and order are firmly established, to take upon himself the summary execution of a sentence of death which the Government of the day considered themselves bound in honour not to carry into effect.

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## No. 63.

### Obligation on the Government to settle claims against King of Oude.

( *May, 1859.*)

It appears to me that the British Government is not, either morally or otherwise, under any obligation to discharge the whole or any part of the debt alleged to be due to Mr. Frith as representative of his late grandfather, Colonel Robert Frith, upon the bond entered into by Azoff-ul-Dowlah, dated 31st July, 1785; and, in my opinion, it would be very inexpedient to admit that any such obligation exists, by offering to pay any part either of the principal or interest. Such an admission, even if it extended only to the principal, might be used as a strong argument in support of the claim to interest at the rate reserved by the bond, *viz.*, 12 per cent. per annum, and would probably cause many similar claims to be raked up and brought forward not only in the case of Oude, but also in the case of other Native States which have lapsed to the British Government.

2. In the Memorial dated the 31st June, 1856, and addressed to the Chairman and Deputy Chairman of the Hon'ble Court of Directors, Mr. Frith makes use of many arguments which have from time to time been urged for the purpose of showing that an obligation existed on the part of the East India Company before the annexation of Oude to discharge the debt out of the general revenues of India, but those arguments are of no greater force now than they have been at any time since the date of the bond, and whatever differences of opinion may have existed at one time as to the obligation of the East India Company to urge upon the King of Oude the importance of an immediate and effectual adjustment of the debt of the Lucknow Bankers, I do not find that any one ever entertained the opinion that the East India Company were bound to satisfy that or any similar demand, of which there were many, out of the general revenues of India.

3. From 1790 down to the present time frequent applications have been made for payment of the debt alleged to be

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due to Mr. Frith, and other similar claims, but the Hon'ble Court and the Government of India have invariably refused to interfere either by discharging the debt or even by urging the Nawab Vizier to do so, though they have, on several occasions, allowed the claim to be presented to the Vizier by the Resident as the sole and regular channel of communication between the Vizier and British subjects. (See, amongst others, letter from Secretary to Government of India to the Resident at Lucknow. Consultation, 18th May, No. 28.)

4. The only new ground which has been urged by Mr. Frith in the Memorial now under consideration is that the East India Company having succeeded to the Kingdom of Oude and its revenues, are bound to discharge all just claims against the former Government. But if the length of time (upwards of 70 years) which has elapsed since the debt was contracted, and the repudiation of the debt by six successive Sovereigns who have dealt with the revenues of the State, as if the debt had never existed are not in the present case to be deemed a bar to any recognition of the demand, it is impossible to say how many old claims against Native States which have lapsed to the East India Company may not be preferred upon similar grounds. Mr. Frith appears to consider that the East India Company are now under the same obligation to satisfy the debts contracted by Azoff-ul-Dowla, as they would have been if the Nawab Vizier Saadut Ali had in 1799 abdicated and made over the whole of his territories and revenues to the East India Company, and in order to show that such an obligation would have existed if Saadut Ali had abdicated in favor of the British Government, he quotes the explanation of Lord Mornington respecting the 10th Article of the Treaty tendered in November, 1799, by which it was stipulated that Nawab Saadut Ali should not be responsible for any debts contracted by the late Nawab. In that explanation His Lordship made the following remarks:—"The justice and necessity of discharging the *bonâ fide* debts to the *Native** creditors of the State, and also the arrears of the Civil and Military Establishments are apparent, *and it might with strict propriety be expected that the Nawab should apply a part of his treasures to the liquidation of these demands.* The Company, however, are willing to take upon them the discharge of all such of these demands as on investigation shall be found to be equitable. His Excellency must, however, be sensible that the

* It is to be observed that Lord Mornington speaks only of Native creditors. The reason seems to be two-fold—1st, because Mr. Lumsden had reported that all the European creditors, with the exception of Mr. Bruce, had been paid; 2ndly, because it was contrary to the orders of the Court of Directors even before the 37 Geo. 3, c. 142, for British subjects in the service of the Company to be concerned in loans to the Native Princes, *see* recital, s. 28 of that Act. It was in 1799 in which Lord Mornington spoke of the Native creditors only, notwithstanding Colonel Frith had sent in his second Memorial in 1798.

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Company could never think of taking upon themselves this heavy burthen without being put in possession of the complete control over the resources of the State from the improvement of which, under a course of steady and "economical management, they can alone expect to be reimbursed for the amount."

5. It should be remarked that, according to the proposed Treaty, the Nawab Vizier was to abdicate in favor of the East India Company. Bearing this fact in mind, the explanation above quoted shows that Lord Mornington considered that, in strict justice, Saadut Ali, even if he should abdicate, was bound to apply part of his large treasures (treasures which he had amassed from the revenues of the State) to the liquidation of the debts of Azoff-ul-Dowlah, but that the East India Company might be willing, notwithstanding, to take upon themselves such of the debts due to the *Native* creditors as upon investigation might be found to be equitably due, provided the Nawab Vizier would abdicate in favor of the Company, and make over to them the whole of his territories and revenues. Upon such conditions, the East India Company were willing to enter into the Treaty tendered by which the Nawab was to abdicate, and the East India Company were to stipulate in the terms of the 10th Article that "he should not be responsible for any of the debts contracted by Azoff-ul-Dowlah." But admitting that in 1799, when the justice of the claims might easily have been investigated, the East India Company were willing to take upon themselves the payment of the debts equitably due to the Native creditors, upon condition that Saadut Ali would abdicate in favour of the Company, it by no means follows that any obligation now exists to pay those same debts because the Company have obtained possession of the revenues of the State under totally different circumstances and without any condition whatever.

6. In 1799, the justice of the claims might easily have been investigated, and if any of the debts had been found to be equitably due, and had been paid at that time, the payments would probably have been made to the persons with whom the debts were contracted. This certainly would have been the case as regards Colonel Frith, if anything had been found to be* equitably due to him. But if the demand be paid now, the payment must be made not to Colonel Frith himself but to a descendant in the 2nd degree from him who would not in all probability have been one whit the richer if the debt had been paid to his ancestor. In fact, Colonel Robert Frith stated in his Memorial that the money alleged to have been advanced by him on account of the Nawab was money which he had borrowed from Natives whom he would be unable to pay unless he should receive both the principal and interest due to him. There is every reason

* Colonel Frith did not die until the year 1800.

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therefore to suppose that the persons who actually advanced the money were never repaid by him, and I would ask what security is there that they will ever receive a farthing even if Mr. Frith be now paid the full amount of the bond with interest? But it may be said that if there is a strict right on the part of Mr. Frith to receive payment of the bond, considerations such as these cannot bear upon the question. It may be proper, therefore, to consider whether the acquisition of the revenues of Oude in 1856 imposed upon the East India Company any obligation to pay the debts contracted by Azoff-ul-Dowlah in 1785. I hold that it did not even if it could be proved, which it certainly has not been to my mind, the services alleged to have been rendered, or the monies advanced were rendered or advanced on account and upon the credit of the State and not upon the mere personal credit of Azoff-ul-Dowlah. I would go further and say not only that no such obligation exists, but that it would be unjust to the present generation, to apply the revenues of the State in payment of debts contracted upwards of 70 years ago, instead of applying them towards improving the condition of the people. Mr. Frith's petition is not accompanied by a copy of the bond, and I have not been able to obtain one, but I will assume that Azoff-ul-Dowlah bound himself and his successors, the strongest case against the East India Company, for it is not pretended that Colonel Robert Frith ever received a tunkhah or assignment of the revenues for more than the one lakh of rupees which were paid to him. There is a wide difference between a constitutional Government and a Government such as that of Oude under the Nawab Viziers, in which they, as *quasi* absolute Sovereigns, were allowed to squander upon their own personal vices and gratifications as much of the revenues of the State as was not appropriated to the purposes of Government. In the case of the Government of Bombay *vs.* Ameer Chund, Lord Tenterdon asked, "What is the distinction between the public and private property of an absolute Sovereign?" He said, "You mean by public property, generally speaking, the property of the State, but in the case of an absolute Sovereign who may dispose of every thing *at any time and in any way he pleases*, is there any distinction? And in delivering judgment in the same case, His Lordship remarked "I have already intimated my opinion and I have the concurrence of the other Lords of the Council with me in it, that when you are speaking of the property of an absolute Sovereign, there is no pretence for drawing a distinction, the whole of it belongs to him as Sovereign, and he may dispose of it for his public *or private* purposes in whatever manner he may think proper." Although the Viziers of Oude dealt with the revenues of the State very much like absolute Sovereigns, and disposed of them during their own lives just as they pleased, they were not in

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strictness absolute Sovereigns, they were merely delegated by and subject to the paramount power, and had no authority, without the consent of that power, to assign over to a private individual any portion of the territories placed under their government, or to charge the public revenues so as to bind their successors. To admit that Azoff-ul-Dowlah could have charged the revenues with the payment of any debts which he might contract, even though the money might have been expended for the purposes of government, would be to admit that he could have appropriated the whole of the current revenues of the State to his own private purposes and have borrowed money for the immediate purposes of Government upon the credit of his successors, and upon the security of those revenues by which alone they could properly carry on the government of the country.

7. But even if Azoff-ul-Dowlah or any other Vizier had the power to borrow money for the purpose of Government upon the credit of the revenues of the State, and to charge such debts upon the revenues so as to bind his successors, I think it is clear that he had no power to exempt his immediate successors, and to throw the whole burthen of his extravagance upon the people of the 3rd or 4th generation after him, by charging his debts upon the revenues of 1857 or any subsequent period. If Azoff-ul-Dowlah had done so, I apprehend that the British Government would not now have considered themselves morally bound to discharge such debts after six Sovereigns or Viziers in succession to him, had, without regard to the interests or welfare of the people, been squandering the revenues of the State upon their own personal gratifications and follies or in amassing wealth to be dissipated by others.

8. If, in the case supposed, the British Government would not have recognised the debts as a charge upon the revenues of which they became possessed upon the annexation of Oude, I cannot see any good reason why they should admit their liability to satisfy any portion of the present demand, for by so doing they will be admitting that Azoff-ul-Dowlah and the six succeeding Sovereigns had power to do that which any one of them singly could not have done. If the necessities of the State required that debts should be contracted upon the security of the revenues, those debts ought to have been repaid out of the first revenues available for the purpose, after satisfying the current expenses of the Government of the country and making a liberal allowance for the support of the King and his family and attendants in a manner suitable to their rank and condition.

9. Admitting this principle to be the correct one, all the debts contracted by Azoff-ul-Dowlah, assuming that they were necessarily incurred for the benefit of the State (a fact which I by no means admit), ought to have been paid, if not in the lifetime of Azoff-ul-Dowlah, at least during the reign of Saadut Ali,

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for the latter accumulated out of the revenues of the State a much larger sum than was sufficient to pay all the debts of Azoff-ul-Dowlah.

10. It is said that his accumulations amounted to 13 millions * sterling. The whole of these large accumulations were inherited by his son Ghazee-ood-Deen Hyder who succeeded as Vizier in 1814. Yet that Prince as well as his father entirely repudiated all responsibility to discharge any of the debts contracted by Azoff-ul-Dowlah.

* See Mill's History of India, Vol. VIII, p. 109

11. In a letter of the 29th October, 1816, from the Nawab Vizier Ghazee-ood-Deen Hyder to the Resident at Lucknow upon the subject of other claims, he writes: "The claim of Captain Frith which was forwarded to me in your letter of the 15th Shaol (8th September), is of a similar description. You will be pleased to bring these circumstances to the favourable attention of His Excellency the Governor General, so that there may be neither discussion nor correspondence hereafter on affairs of this nature." Again, on the 21st December, 1816, he addressed the Resident as follows: "I cannot consider it incumbent on me to have any concern with demands referable to the time of the Nawab Azoff-ul-Dowlah, *and of which I have no knowledge whatever; my father at the time of his accession denied all claims of gentlemen and others relative to the time of my late uncle*, and the adjustment of them was not mentioned in the Treaty. Therefore, neither this nor other claims of a similar nature can at all apply to me."

12. In 1840, Colonel Frith renewed his demand upon the King of Oude, Mahomed Ali Shah, who peremptorily refused to recognize the claim.

13. Thus, it appears that the debt has been actually and finally repudiated by two Nawabs and one King of Oude; and it has been virtually repudiated by their successors, all of whom have dealt with the revenues of the State as if the claim had never existed. If the debt ought to have been satisfied at all out of the revenues of the State, which accrued after the death of Azoff-ul-Dowlah, it ought to have been paid by Saadut Ali, or his son, Ghazee-ood-deen Hyder, out of the treasure saved by the former from the revenues of the State, to which the latter succeeded; but they both repudiated the debt, and applied those funds to other purposes. I do not think that the British Government by reason of their acquisition of the revenues of Oude, are in any way bound to enter into the consideration of a question which has been finally decided by the former Rulers of that State, who have dealt with the revenues upon the footing of that decision. Even admitting that their decision was wrong, and that Saadut Ali was morally bound to pay the debts of Azoff-ul-Dowlah, the British Government are no more responsible for

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his shortcomings in this respect than they are for any of the other delinquencies or omissions of the former Rulers of the State.

14. If Azoff-ul-Dowlah, having sufficient funds from the revenues to enable him to discharge his debts, had applied those funds to his own private purposes, leaving his debts unpaid, the British Government would surely not have been bound to pay those debts in consequence of their obtaining the possession of the revenues 70 years after the debts were contracted, and if not, there does not appear to be any valid ground for contending that the people of the present generation ought to bear the burthen of those debts, which, if they had not been repudiated, might have been paid out of Saadut Ali's savings from the revenues during the period of his rule. The people of Oude gained nothing by his amassing the great wealth which was inherited by his son, nor would the State have been injured if he or his son had appropriated a portion of his revenues to the payment of the debts of Azoff-ul-Dowlah, instead of appropriating them as they did, but as Rulers of the State they repudiated the debts and applied the surplus revenues in a manner wholly unprofitable to the State.

15. It cannot be urged that if the Province of Oude had never been annexed the alleged creditors of Azoff-ul-Dowlah would have been paid by the Native Government, to which the British Government succeeded. The Native Government had absolutely repudiated the debts, and it is quite clear that they never would have paid them.

16. In the debate which took place in the House of Commons on the 28th July, 1834, upon the subject of the claim of the Lucknow Bankers, Sir Robert Peel, after illustrating the impolicy of taking up the case, concluded his speech by referring "*to the possible assumption of the Government of Oude by the British Government* and solemnly deprecating, *in that case*, the commencement of the exercise of Sovereignty by appropriating £11,000,000 sterling of the property of the territory to the liquidation of a claim for which it did not appear that the British Government had ever made itself in the slightest degree responsible." (*See Thornton's History of India, Vol. VI, p. 21.*) Mr. Thornton refers to the Mirror of Parliament as his authority, but I have not the book here, and have therefore not been able to see that report of the speech, but I have referred to the opinion as it completely accords with my own. I have thought it right to consider the case upon general principles, because there are many other similar claims upon which it will be necessary to come to a decision.

17. In regard to Mr. Frith's claim, I cannot help thinking that the lakh of rupees which he received upon the tunkah was as much as he was fairly entitled to under the bond, and

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I think that it was probably considered by Azoff-ul-Dowlah and his Minister as a compromise and settlement of his demand.

18. This case affords proof of the difficulty of investigating claims of 70 years' standing, and of the wisdom of the remark made by Ghazee-ood-deen Hyder, "that he could not consider it incumbent on him to have any concern with demands referable to the time of Azoff-ul-Dowlah, *of which he had no knowledge whatever.*"

19. The claim made by Mr. Frith consists of two items :—

| | R |
|---|---|
| Principal due upon bond to Colonel Robert Frith, dated 31st July, 1785 . . . . . | 2,70,000 |
| Allowance for 12 months ending 31st July, 1786, for commanding a Company of the Nawab's Battalion at R5,000 per month . . . | 60,000 |
| | 3,30,000 |

Against this sum credit is given for one lakh of rupees received by Colonel Robert Frith upon a tunkah or assignment on the Nawab of Farrukhabad payable by three *Kists* in 1789-90, 1790-91 and 1791-92, respectively, and the balance with interest at 12 per cent. to the present time is claimed. The balance in 1818 amounted to Rs. 11,87,458, and with interest to the present time would amount to Rs. ? .

20. Mr. Frith in his Memorial now under consideration says :—"With regard to the interest which has accumulated that has arisen from an arbitrary refusal of the Native Government to pay the debt, the validity of which they never questioned;" and then with a show of great liberality proceeds: "Still I am willing to admit that the interest appears to be a fair subject of compromise, and I would respectfully suggest that a moderate and reasonable amount of simple interest should be fixed for the whole period as the most equitable mode of settling that portion of the claim." I strongly recommend that he should not be paid either principal or interest.

21. It appears that Colonel Robert Frith, then Captain Frith, was Aide-de-Camp to Warren Hastings in 1782-83 and 1784, and that upon the Governor General's quitting Lucknow in 1784, he was appointed to take the command of a corps belonging to the Nawab at a salary of Rs. 5,000 a month.

22. Mr. Frith and his father, who was the son of Colonel Robert Frith, in the Memorials which have been from time to time presented, have always claimed the full amount of the bond, Rs. 2,70,000,* and interest. But Colonel Robert Frith, the original creditor in 1798, gave his own account of the transaction.

* See the account said to have been made out by Colonel Frith's brother in 1798 with interest, account continued to February 1st, 1818, shewing a balance of Rs. 11,87,458.
Letter to T. H. Maddock, Esq., dated 4th September, 1839.
Consultations, 20th November, 1839, Nos. 103-104.

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23. In the account then transmitted by him, he claimed not the whole amount of the principal of the bond, but only Rı,50,000* thereof as his share after deducting —

* See account, dated 31st January, 1798. Consultations, 5th March, 1798, No. 5.

| | R |
|---|---|
| Mr. Robert Grant's share thereof . . . . . | 80,000 |
| „ „ Bruce's „ . . . . . | 22,000 |
| Colonel Palmer's „ . . . . . | 18,000 |
| | 1,20,000 |

He also claimed Rs. 60,000 as his allowance as Commanding Officer of a Corps of Sepoys in the Nawab's service for one year from 31st July, 1785, to 31st July, 1786, and interest on the above sum at 12 per cent., and he gave credit for Rs. 1,00,000 received upon the tunkah on the Nawab of Farrukhabad, dated in 1789, and he added the following note :—

"*1st N. B*—Major Frith's share of the bond for Rs. 2,70,000, arose from an allowance of Rs. 5,000 granted to him by the late Vizier on the Command of four battalions of Sepoys being conferred on him, in lieu of all emoluments from money advanced to the battalions by Buksh Raye and Kashmery Mull on his credit, and for feeding and other expenses of the gun bullocks of the artillery attached to the battalions. The account of the whole was made up to the 31st July, 1785, approved of, and the bond granted."

24. Thus it appears that his share of the bond consisted partly of arrears of his allowance of Rs 5,000 a month, due prior to the 31st July, 1785, partly of money advanced by two natives on his credit (whether they were ever repaid or not does not appear), and partly on account of expenses of the gun bullocks, etc.

25. The other item claimed by him was Rs. 60,000 for arrears of allowance from 31st July, 1785 to 31st July, 1786. To this item he attaches a note—

"*2nd N. B.*—A bond for Rs. 40,000 in part of the Rs. 60,000 above charged was offered to Major Frith, but rejected, because the full amount of his allowances was not included."

26. The above account was dated 31st January, 1798. Colonel Robert Frith had, however, in 1790 sent in a previous account in which he showed that his claim for principal on the bond amounted to only Rs. 1,00,000. There seems to be no reason to suppose that Colonel Robert Frith's claim for principal on the bond exceeded Rs. 1,00,000, the amount stated in his first account in 1790, and if so, it is probable that the Rs. 1,00,000 received on the tunkah was intended to cover his demand upon the bond, for I find that an arrangement was subsequently made on behalf of Azoff-ul-Dowlah with all his other European creditors, by which they, with one exception, agreed to receive the principal of their debts without interest.

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"In 1795, the Vizier Azoff-ul-Dowlah became sensible of the urgent necessity of retrieving his affairs, and requested the British Government to allow their Resident, Mr. Cherry, to assist him in ascertaining the amount of his debts with the view to their liquidation. Sir John Shore consented to the Resident's affording the required assistance, and promised the communication of his own opinion upon the result whenever called upon; but he restricted Mr. Cherry's interference in the adjustment of the claims, to transmitting applications, and forwarding answers. In the performance of this duty Mr. Cherry had an opportunity of informing himself of the Nawab's debts which appear from a statement he received from the Minister and transmitted to the Governor General in November, 1795, to have amounted to Rs. 1,02,40,120, besides 75 lakhs for salaries to officers." See correspondence as above, p. 6.

"Mr. Lumsden succeeded Mr. Cherry as Resident, and the following is his account of the arrangement :—

"The whole of the *principal* debt has been paid to the *European* creditors, Mr. Bruce excepted, half in gold and half in silver, and they have each executed a general release and given up their bonds. The negotiation was finally closed at a late hour last night when Rajah Janoo Lall proceeded to join the Vizier, having previously ordered away the money which he had deposited in my Treasury for the purpose of paying Mr. Bruce* if he had acquiesced in the Vizier's offer. Mr. Bruce demanded interest as well as principal, and thus lost his whole debt amounting to Rs. 4,50,000. The other European creditors had consented to receive the principal of their debts without interest" (see same correspondence, page 7). I have examined the list of creditors sent in by the Minister to Mr. Cherry, but the name of Colonel Robert Frith is not mentioned therein, which leads me to suppose that, having received on the tunkah one lakh of rupees which, according to his account of 1790, was the full amount of the principal due to him on his bond, or for some other reason, he was not acknowledged as a creditor by the Nawab or his Minister in 1795, when the Nawab was arranging to compound with his European creditors by paying them their principal without interest.

* This Mr. Robert Bruce is no doubt the same person who is said by Colonel Frith to have had an interest in the bond to the extent of Rs. 22,000. This sum was in all probability included in his demand.

27. I do not find in the list of creditors the name of Mr. Robert Grant or that of Colonel Palmer, the former of whom Colonel Frith admitted to be interested in the bond to the extent of Rs. 80,000 and the latter to the extent of Rs. 22,000.

28. The latter is no doubt the Major Palmer who was the private agent of Warren Hastings at Oude so frequently alluded to in the articles of impeachment, and who is said

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himself to have had a salary of £22,800 a year (*see* Burke's charges, No. 16, s. 89).

29. This is also, I presume, the gentleman who is referred to in Mr. Frith's present Memorial as having ascertained the balance due to Colonel Frith, though no mention is made of the fact that he himself was one of the persons interested in that balance. Mr. Frith says "Major Palmer resigned his office in 1785, and in making up his accounts, ascertained the balance due to Colonel Frith from the Nawab. For this amount a bond bearing interest at 12 per cent. was sealed by the Nawab in favor of Colonel Frith and officially delivered to him by *Major Palmer.*" * * * * * * *

"With respect to the debt no question can, I think, arise, as Mr. Palmer, the Resident at Lucknow, has given most ample proof of its correctness both in his Report to the East India Company and in his letters to my father."

30. What Mr. Palmer had to do with ascertaining the balance due to Colonel Frith from the Nawab, in making up his own accounts, I am at a loss to conjecture. I have no doubt that Major Palmer must have received his share of the principal of the bond, for in his letter dated 21st August, 1813, to Captain Frith, the son of Colonel Frith, he makes no mention of any part of the principal remaining due to himself. He says "*I am entirely ignorant of the share to which your father was entitled of the bond for Rs. 2,70,000 in his name granted by the Vizier,*" but he says nothing of his own share in the bond or that any portion of what he had himself advanced remained due.

31. Mr. Bruce, it appears, was not paid because he refused to come into the compromise, but that is not a sufficient reason for Mr. Frith's now claiming his share. The whole claim, so far as the bond is concerned, is so unsatisfactory, that even if I considered that there was any obligation on the part of the East India Company to satisfy the debts of Nawab Azoff-ul-Dowlah, I could not recommend that any portion of the principal or interest on the bond for Rs. 2,70,000 should be paid.

32. In 1790, Mr. Frith claimed Rs. 1,00,000 only of the principal due on the bond. In 1798, he claimed Rs. 1,50,000 as his share. His son and grandson have increased the demand of principal due on the bond to Rs. 2,70,000. Notwithstanding these variances, important under any circumstances, but still more so when interest at 12 per cent. from 1785 to the present time is claimed, I think it is clear that Colonel Frith's share of the principal of the bond did not exceed Rs. 1,00,000, and which he claimed at first. It is also clear that he received that amount upon a tunkah, and that the rest of the European creditors, with the exception of Mr. Bruce, compromised their claims in 1795 by receiving the principal without interest, and that they received

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better terms than the Native creditors ; that a great portion of Colonel Frith's share in the principal of the bond was not for money advanced, but for arrears of salary of Rs. 5,000 a month to which Colonel Frith, though only a Captain at the time, having been Aide-de-Camp to Warren Hastings in 1782-83 and 1784, was appointed just previously to the latter's leaving India (a salary which appears to have been exorbitant for a Captain in the Army) ; that Colonel Frith was not included in the list of creditors made out by the Minister, Rajah Tickatt Roy, and sent to Mr. Cherry, the Resident, in 1795 ; that no sufficient explanation is given why, if he considered that Azoff-ul-Dowlah was his debtor, Colonel Frith did not bring forward his claim when Azoff-ul-Dowlah was settling his debts in 1795, but waited until 1798, a year after his death, Azoff-ul-Dowlah having died in 1797; that this claim has not been brought forward in a manner calculated to afford much confidence that any portion of the demand remains fairly due. As to the second item of the demand, *viz.*, one year's allowance, Rs. 60,000, and interest thereon at 12 per cent,* I do not think that the Government in 1857 is called upon to pay salaries which became due to officers in 1785 either with interest at 12 per cent. or without interest even if it were clear that the salaries were just and equitable. But still less ought such salaries to be paid when the circumstances under which the appointments were made lead to the conclusion that the interests of the officer rather than those of the State were considered in the arrangement.

* In the account sent in by Captain Frith in 1790, he made no claim for interest on the arrears of salary said to have become due in July 1786, although he said it was in fact equally due.

33. I find from Colonel Frith's own Memorial that Mr. Macpherson, who succeeded Warren Hastings, and Mr. Stubbs disavowed any knowledge of Colonel Frith's appointment, and in doing so refused their sanction to the Vizier's payment of the allowances annexed to it. I find in the extract of Proceedings of the Governor General in Council in the Secret Department, 3rd May, 1785, the following entry :—

"Captain Frith, Commanding four battalions of Sepoys, in lieu of all charges and contingencies whatever, 5,000 rupees per mensem." "The Board know nothing of Captain Frith's appointment, and cannot therefore authorize the allowance."

Consultation, dated 19th October, 1790, No. 11.

I find also the following extract of a letter in the Secret Department to the Hon'ble Court of Directors, dated 31st July, 1785, paragraph 8 :—"The Governor General's Agent has been directed to acquaint the Vizier that the salaries paid to Captain Frith cannot be authorized."

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Surely if after this letter Captain Frith thought fit to continue in the employment of the Nawab Azoff-ul-Dowlah, and the latter chose to continue him there for another year, the salary cannot fairly be considered as a public debt binding upon the revenues of his successors.

34. In 1790, a claim was brought forward by Major Darell for arrears of salary due to him from the Vizier, amounting to 98,000 rupees: the Government determined "that as it came in every respect under the description of a private debt, it would be no less improper with regard to the Vizier than derogatory to the dignity of the Government to take any concern in soliciting the payment of it, and of this decision the Court approved."

35. The claim of Colonel Frith was considered by the Committee of Correspondence to be similar in its nature to that of Major Darell. If the debt was a private debt it cannot, I think, constitute a valid claim against the revenues of Oude in the hands of the East India Company looking upon them in the character of successors, and still less so if they are to be looked upon as the paramount power.

36. For the above reasons, I recommend that Mr. Frith's claim be rejected altogether.

37. As to Mr. Prendergast's claim, this is the old claim of the Dosses, and has been referred to the Hon'ble Court of Directors. I do not think that there is any obligation to pay it, and, if necessary, I would recommend the Hon'ble Court to reject it, but I presume the Government must wait until they receive an intimation from the Hon'ble Court. The case is fully considered in the correspondence above referred to, a very interesting paper, and also in the 6th Volume of Thornton's History of India, page 1.

Mr. Prendergast's claim.

38. In the debate in the House of Lords on the 5th May, 1834, Lord Ellenborough declared that the then agent of the claimants, Mr. Prendergast, was more than an agent, and he stated that it was generally believed, indeed that it was notorious, that he purchased the whole or part of the private claim of the party in whose name he appeared. He contended that the purchase was unlawful by the spirit and letter of the Statute 37 Geo. III, c. 142, and said that the letter forwarded by the Board of Control to the Court of Directors was an illegal letter. "It was in favour of a claim which was entirely void by the English law—it was in favour of an individual who claimed by virtue of having purchased the bond, which purchase was a misdemeanour." The Lord Chancellor denied that Mr. Prendergast had purchased the claim of those whom he professed to represent.

See 6 Thornton's India, pp. 12, 13 and 14.

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39. It appears now from the present Memorial that upon the death of Mr. Prendergast in 1834, his representatives, *viz.*, the present claimant, and his *mother* and brother, were by fresh powers-of-attorney invested with the same powers and under the same obligations as his father.

40. It is a remarkable fact, if Mr. Prendergast had no interest in the debt, that his *widow* and two sons should be appointed agents in his place.

41. The appointment of Mr. Prendergast's representatives, including his widow, as agents in his place is much more consistent with the fact of Mr. Prendergast having had an interest in the debt than with that of his having been a mere agent.

42. Who are the supposed representatives of the Dosses at the present time does not appear. The claim is made as agent under powers said to have been executed in 1834. If this debt were now to be paid, I expect the heirs of the Dosses would have a very small share of it.

43. Possibly if the agent were asked, he could not state who are the present heirs of the Dosses.

44. If the debt was purchased by Mr. Prendergast, I suspect he gave a very small sum for it as is usual in such cases.

Claim of the Revd. James Fendall, Executor of Mrs. E. Grant, junior, and Executor of Robert Grant, deceased.

45. The sum claimed for the estate of Mr. Grant is Sa. Rs. 90,265, with interest at 12 per cent. on a bond given by Azoff-ul-Dowlah dated 12th December, 1783, and for salary due from the Nawab Vizier to Mr. Grant as assistant to the Resident. The consideration of the bond is alleged to be a horse sold to the Vizier, and money received by the Vizier or some tunkahs given by the Nawab Muzaffer-Jung, a tributary chief of Oude, for certain merchandize sold to him by Mr. Grant. It is stated that Azoff-ul-Dowlah received the amount of the tunkahs on account of the grant to obviate inconvenience but never paid over the money to him. I would reject the claim, altogether.

46. I presume this is the same Mr. Grant who is said to have been entitled to a share of the bond given to Colonel Frith. His name is not inserted in the list of creditors sent by the Minister to Mr. Cherry in 1795.

47. It appears from the petition that Mr. Grant in 1783 entered the service of the East India Company, and was appointed assistant to the British Resident at Lucknow. *That shortly after the transaction in question*, he was removed by Government from Lucknow at 48 hours' notice; that he petitioned in vain to be allowed to return to Lucknow to arrange his affairs, but that no reply was vouchsafed. A list of



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documents is annexed to the Memorial, but they are not sent (see Mr. Jenning's letter). I would reject the claim altogether. I scarcely think that the claimants can be serious in supposing that it will be paid.

Claim of the Dowager Lady Darell as representative of Sir Verelst Darell.

48. The claim made by Lady Darell as representing Major Darell is for 98,000 Sa. rupees due on seven bonds alleged to have been given by Azoff-ul-Dowlah to Major Darell for arrears of pay as Aide-de-Camp to the Nawab Vizier from 1779 to 1783.

Major Darell was previously Aide-de-Camp to Sir Eyre Coote, Commander-in-Chief, but resigned that appointment upon obtaining the appointment of Aide-de-Camp to the Vizier.

49. Six of the bonds for 90,000 rupees bear interest at 12 per cent., the other does not bear interest. This debt as shown above has always been treated as a *private debt*. Major Darell's name was not in the list of creditors sent on to Mr. Cherry in 1795, and I would reject the claim altogether.

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## No. 64.

### PROPOSAL TO FINE THE MAHARAO OF KOTAH.

*(23rd May, 1859.)*

I DO not see upon what principle the imposition of a fine of 15 lakhs or any other fine can be justified, and I think it would be inexpedient to impose it. Our relations with the Maharao are regulated by treaty, and nothing short of a *casus belli* can justify us in altering those relations without his consent. Thus I do not understand upon what principle we can increase the tribute as suggested by Mr. Edmonstone. By the 5th Article of the Treaty of 1838, the Maharao agrees to maintain an auxiliary force—the expense of such force is not to exceed three lakhs of rupees (reduced in 1848 to two lakhs), and if the force be raised, the funds for its maintenance are to be paid to the British Government along with the tribute, Article 7. I think the British Government cannot, without considering the treaty at an end by reason of the Maharao's misconduct, declare the two lakhs applicable to any purpose to which they may think fit to apply it, although they may at the same time declare their intention to apply it to the maintenance of a European force in Rajpootana. I do not think that the inaction of the Maharao on the occasion of the murder of Major Burton and his family, or his indiscretion or mistake in inviting the Agent to return, are sufficient to justify us in setting the treaties at nought. If

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any alteration be made as regards the nature of the force to be maintained for the protection of Rajpootana, which is a matter for separate consideration, it should form the subject of negotiation rather than of dictation.

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## No. 65.

### SYSTEMS OF LEGISLATION UNDER THE ACTS OF 1833 AND 1853.

*(3rd November, 1859.)*

THE Right Hon'ble the Secretary of State for India has done me the honour of requesting my opinion, for the information of Her Majesty's Government, as to the merits of the system of legislation in India which preceded the 16th & 17th Vict., c. 95, in comparison with that which at present exists under the provisions of that Act.

In answering that question, I have no hesitation in stating that, in my opinion, the present system is in every respect preferable to that which existed under the 3rd & 4th Will. IV, c. 85. By that statute the sole power of making laws and regulations in India was vested in the Governor General of India in Council. That body consisted of the Governor General and four ordinary members of council; the Commander-in-Chief, if appointed an extraordinary member of council, also formed one of the body. Of the four ordinary members, it was directed that three should be appointed from persons in the covenanted service of the East India Company, and the fourth from persons who had never been in the service.

The duty of the fourth ordinary member was confined entirely to the subject of legislation; he had no power to sit or vote except at meetings for the purpose of making laws and regulations; and it was only by courtesy, and not by right, that he was allowed to see the papers or correspondence, or to be made acquainted with the deliberations of Government upon any subject not immediately connected with legislation.

In my own case, I was allowed to see the papers and minutes of consultation in the Home and Legislative Departments, but I was as ignorant of everything that was going on in the Foreign, Secret, Military, and Financial Departments as if I had not been a member of council. I am not urging this as matter of complaint, but I allude to it merely as part of the system. I always received the greatest courtesy and consideration from the Marquis Dalhousie and my hon'ble colleagues, and I believe that I had their confidence, but it was strictly in accordance with law that the fourth ordinary member of council should not sit or vote except at meetings for making laws and regulations. It was not necessary that he should be present to

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form a quorum at meetings for making laws, although he was particularly charged with the duties of legislation. All that was necessary was that the Governor General and three ordinary members should be present.

The following extract from a most eloquent and admirable despatch of the Hon'ble Court of Directors, No. 44 of 1834, paragraph 21, refers more particularly to the duties of the fourth ordinary member :—

'The concurrence of the fourth member of council may be wanting to a law, and the law may be good still ; even his absence at the time of enactment will not vitiate the law ; but Parliament manifestly intended that the whole of his time and attention and all the resources of knowledge or ability which he may possess should be employed in promoting the due discharge of the legislative functions of the council. He has indeed no pre-eminent control over the duties of this department, but he is peculiarly charged with them in all their ramifications. His will naturally be the principal share not only in the task of giving shape and connexion to the several laws as they pass, but also in the mighty labour of collecting all that local information, and calling into view all those general considerations, which belong to each occasion, and of thus enabling the council to embody the abstract and essential principles of good government in regulations adapted to the peculiar habits, character, and institutions of the vast and infinitely diversified people under their sway.'

The principal share of the duties thus described devolved upon the fourth member, usually, though not necessarily, selected from the Bar, whose duration of office was generally limited to the period of five years, who probably had never passed a single day of his life in India and who was generally on his arrival wholly unacquainted with the native languages. His laborious duties and the limited period of his holding office did not allow of his visiting various parts of India in order to collect local information or to ascertain by personal experience how the laws worked and were administered, and he was unable by personal communication with the natives to make himself acquainted with the manners, the feelings, the prejudices, or even the wants or wishes of the people, in legislating for whom he was to take a principal share. I heard much of the corruption of the native police, and of the inefficiency, to say the least of it, of the native judges, and often when a law was proposed by one person, I was told by another that the police would convert it into means of extortion, or that the native judges could not safely be entrusted with the powers which it proposed to confer upon them, or that the law was wholly unsuited to the habits or feelings of the people. I had not the means upon my first arrival in the country of forming a correct judgment upon these and other singular conflicts of opinion, and I must confess that when I calmly considered the nature of the duties which I had undertaken, I felt almost appalled and overwhelmed.

Such duties appeared to me to surpass the powers of any one individual, even though he might possess the vast know-

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ledge and the transcendent abilities of some of my predecessors in office. I was determined, if my health permitted, to do everything which indefatigable labour and industry could effect, but this I found was but little. I often thought of the eloquent and forcible language of the Hon'ble Court of Directors, who in the despatch above referred to, in speaking upon the subject of legislation in India, expressed themselves as follows :—

'In contemplating the extent of legislative power thus conferred immediately upon our Supreme Government, and in the second instance on ourselves; in considering that in the use of this power the difference between the worst and the best of governments mainly depends; in reflecting how many millions of men may, by the manner in which it shall in the present instance be exercised, be rendered happy or miserable; in adverting to the countless variety of interests to be studied and of difficulties to be overcome in the execution of this mighty trust, we own that we feel oppressed by the weight of the responsibility under which we with you are conjointly laid. Whatever means or efforts can be employed on the occasion; whatever can be effected by free and active discussion or by profound and conscientious deliberation; whatever aids can be derived from extrinsic counsel or intelligence,—all at the utmost will be barely commensurate with the magnitude of the sphere to be occupied, and of the service to be performed.'

I derived much valuable information from the researches and elaborate reports of the Indian law commissioners; but that body had ceased to exist before my arrival in India in 1852, and long before the introduction of the new system under the Act of 1853. Much of the time of the other ordinary members of council was necessarily occupied by executive duties, and it was almost impossible for the Governor General in Council to devote sufficient time at meetings of the council to consider and discuss verbally the principles and the details of the various laws which were proposed and the conflicting opinions which were frequently elicited by the publication thereof for general information previously to their being passed, and it was out of the question to attempt to substitute written minutes for verbal discussions upon many of the subjects which necessarily came under consideration.

I was greatly indebted to the late Mr. John Colvin, Mr. Halliday, Mr. J. P. Grant, Mr. Beadon, and to the Government pleader, Ramapersaud Roy, for most valuable assistance which their practical experience enabled them to afford, and which they were always most willing to render. But they all had many other duties to attend to, and I should often have found it a great advantage to have had the benefit of verbally discussing matters with a body of gentlemen selected for such duties as those for which the Indian law commissioners were appointed, and to have had the benefit of their researches and experience.

By the Act of 1853, the duties which under the former Act rested principally upon the fourth ordinary member of council are performed by many.

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The Governor of each presidency and the Lieutenant-Governor of each Lieutenant-Governorship is empowered to appoint a legislative councillor. The legislative councillors so to be appointed must be members of the service of a certain standing, and consequently must have passed a considerable time in India, must be conversant with the native languages, and, when selected with reference to their peculiar qualification for the duties of the office, must necessarily be able to bring to bear upon every subject connected with legislation for India much useful knowledge and practical experience, and, in questions peculiarly affecting their respective presidencies, must have the advantage of being practically acquainted with local usages and the peculiar habits and prejudices of the people.

Such a system has many advantages over that which preceded it even whilst the Indian Law Commission was in full operation, for the legislative councillors have the power, which the law commissioners had not, of proposing any law which they may consider necessary or beneficial, of opposing any law which they may deem unnecessary or injurious, of supporting their opinion by argument in council and of voting upon every subject which comes under discussion. The Legislative Council is not diminished in other respects, for every member of the Executive Council, including the fourth member, who has now the power to sit and vote at all meetings, is also a member of the Legislative Council. It is simply increased by members of practical experience.

In addition to the Legislative Councillor, the Chief Justice of Bengal and one of the puisne judges of the Supreme Court selected by the Governor General are also members, and six members in addition to the Governor General or of the vice-president or chairman are necessary to form a quorum, and one of the judges or the fourth ordinary member must be present.

A body so composed must, in my judgment, be preferable to the legislative body under the old system, though I cannot say that it is the best that could be devised. In my opinion, it would be greatly improved by the introduction of some non-official members; but this, perhaps, is rather going beyond the question.

The fourth ordinary member has now a right to sit and vote upon all subjects in the Executive Council. This to a considerable extent prevents him from devoting to legislation as much time as he otherwise would be able to do; but it enables him to become better acquainted with all that is going on, and to form a better judgment as to the policy or impolicy of passing a particular law.

Upon the whole, I consider this to be an advantage. Furthermore, under the present system there is a clerk and clerk assistant to the council. These offices are at present

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filled by gentlemen of great ability: the former by a barrister and an experienced draughtsman, well acquainted with the general principles of law and jurisprudence; the latter by a native gentleman intimately acquainted with the regulations of Government, with the various tenures of land, with the civil and criminal laws as administered in the mofussil, and with the regulations affecting the revenue and police.

The assistance which they are able to render cannot be overrated, especially in the preparation of new laws, and in attending upon the select committees when revising proposed laws after they have been published for general information.

Another great advantage of the present over the former system is the publicity of the discussions of the council. These discussions are generally conducted in a calm, orderly, and business-like manner, and of course cannot be so attractive to the public as the discussions of a larger body in which the warmth and earnestness of party are called into play. But still I believe it is a source of satisfaction to the public to know that any one can without difficulty obtain admittance upon the discussion of any public measure, and that reporters for the public press are always in attendance. Formerly all discussions upon the subject of a proposed law were conducted in private in the same manner as the deliberations upon executive matters. If a law were rejected after it had been published for general information, the public had no means of knowing the cause of its rejection; so, if a law were published for general information, and alterations or modifications were suggested which were not embodied in the law when passed, the public had no means of ascertaining whether the suggestions had been duly considered, whether due weight had been given to them, or whether they had been rejected without sufficient reason.

Under the present system the case is different. The suggestions are duly considered and weighed by the select committees to whom the Bill is referred, and in all cases of importance are specially noticed in the reports. These reports are printed and published and are publicly sold. This, I consider, is also a great advantage which the present system has over that which formerly existed.

G. I. C. P. O.—No. 500 L. D.—15-2-1901.—50.—J. E. F.

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